91-1239

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1991

THE STATE OF TEXAS,

Petitioner,

v.

KERRY MAX COOK,

Respondent.

Petition For Writ Of Certiorari To The Court Of Criminal Appeals For The State Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Should the doctrine of *Estelle v. Smith* be applied retroactively?

(2) Has the Court of Criminal Appeals for Texas misapplied the harmless error analysis of *Chapman v. California* and *Satterwhite v. Texas* by ignoring the critical evidence admitted during the guilt/innocence phase of the trial?

PARTIES TO THIS PROCEEDING

The names of the parties to this proceeding are as follows:

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2. Kerry Max Cook, Texas Department of Criminal Justice, Institutional Division, P.O. Box 99, Huntsville, Texas 77340 (Respondent)

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No. _____

In The

Supreme Court of the United States

October Term, 1991

THE STATE OF TEXAS,

Petitioner,

v.

KERRY MAX COOK,

Respondent.

Petition For Writ Of Certiorari To The Court Of Criminal Appeals For The State Of Texas

PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Texas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals for the State of Texas entered in this proceeding on September 18, 1991.

OPINIONS BELOW

The opinions of the Court of Criminal Appeals of Texas are reprinted in the appendix to this petition. The first opinion of the Court of Criminal Appeals in this cause is reported at 741 S.W.2d 928 (Tex.Cr.App. 1987). The order of this Court remanding the cause is reported

at 488 U.S. 807 (1988). This is the only decision in this cause which has been published.

STATEMENT OF JURISDICTION

The opinion and judgment of the Court of Criminal Appeals were entered on September 18, 1991. Timely motions for rehearing of that decision were overruled on October 23, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). This petition is timely filed pursuant to United States Supreme Court Rule 13.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The Fifth Amendment provision that "no person shall be compelled in any criminal case to be a witness against himself", made applicable to the states through the Fourteenth Amendment, is involved in this case. Also, the Sixth Amendment provision that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense", made applicable to the states through the Fourteenth Amendment, is implicated in this case.

STATEMENT OF THE CASE

A. Statement of the Facts

Sometime in the early morning of June 10, 1977, twenty-one year old Linda Jo Edwards was brutally murdered and mutilated by the Respondent Kerry Max Cook. This was not a typical murder, for the Respondent did not stop at merely murdering Linda Jo Edwards; he also mutilated her body and cut out her sexual organs while she was still alive.

As Lieutenant Doug Collard of the Tyler Police Department testified, the scene of the crime was a grisly sight. The body of Linda Jo Edwards was nude from the waist down. A pair of shoes, panties, and blue jeans lay beside Linda Jo Edwards' feet. The panties had been cut across the crotch and up one side. A stocking was on one leg, while the other stocking was missing and never found. Linda Jo Edwards' brassiere and blouse had been cut up the middle and pulled aside, and there were several places in the brassiere and blouse that had been cut through with a sharp instrument. He noticed an earring lying next to Linda Jo Edwards' right hand still attached to the right earlobe that had been *completely torn loose* from her body.

Linda Jo Edwards had been mutilated in other brutal ways, as well. Closer examination by the lieutenant revealed that her right breast had a large stab wound. Blood on the body indicated smear or "motion" marks, as if the Respondent had rubbed the blood all over Linda Jo Edwards' body. There were multiple wounds in her vaginal and throat areas, part of her lower lip was missing, and her entire vagina had been cut out and removed. These parts of Linda Jo Edwards' body, her vagina and

her lip, were never found. It appeared that a plaster statue had been used to knock Linda Jo Edwards unconscious but there was no evidence of a struggle. Dr. V.V. Gonzalez, M.D., a pathology specialist, testified that he performed an autopsy on the body. He testified that the blow that Linda Jo Edwards received from the statue was not enough to kill her, but that death was caused by cutting of the carotid artery and the jugular vein. She bled to death, but probably not before the Respondent mutilated her. Dr. Gonzalez also testified that scissors had been used to snip away part of her lip. There were four stab wounds to her back. Dr. Gonzalez found three wounds in the pubic region which caused the pelvic cavity to be filled with blood. He determined that Linda Jo Edwards was still alive at this point because of the amount of blood that had penetrated through the bladder. In fact, the cuts in the vaginal area were so extensive and the bleeding so profuse that the autopsy could not indicate whether or not Linda Jo Edwards had been raped. These parts which were cut from her body, including her vagina and her lip, have never been recovered.

The Respondent was convicted of the capital murder of Linda Jo Edwards on July 13, 1978. During the punishment phase of the trial, the State called two mental health experts to testify on the special issue of future dangerousness.[1] The psychiatrist, Dr. James Grigson, based his

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[1] In Texas, capital cases require bifurcated proceedings – a guilt phase and a penalty phase. If the defendant is found guilty, a separate proceeding before the same jury is held to fix the punishment. At the penalty phase, if the jury affirmatively answers the questions on which the State has the burden of

(Continued on following page)

testimony on an interview with the Respondent which was conducted without benefit of *Miranda* warnings or notice or presence of counsel. At that time, the interview procedure was entirely legal and proper. The clinical psychologist, Dr. Gerald Landrum, testified based on his experiences with and treatment of the Respondent in Rusk State Hospital. Dr. Landrum's testimony was necessarily limited by the patient-physician privilege. Both witnesses concluded that the Respondent would continue to be a threat to society.

The State offered all of the evidence admitted during the guilt/innocence phase of the trial and also called several law enforcement witnesses who testified as to the bad reputation of the Respondent. The Respondent offered no evidence at the punishment phase of trial. After the jury deliberated, it returned answers of "yes" to all three special issues required under Article 37.071, Texas Code of Criminal Procedure. Because of these answers, the trial court assessed the mandatory death penalty.

B. Course of Proceedings and Disposition in the Courts Below

The first opinion of the Court of Criminal Appeals affirmed the sentence of death. This decision is reported

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proof beyond a reasonable doubt, the judge must impose the death sentence. *See* Tex.Code Crim.Proc.Ann., Art. 37.071 (Vernon Supp. 1992). One of the special issues that must be resolved by the jury is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Art. 37.071, *supra*.

at 741 S.W.2d 928 (Tex.Cr.App. 1987) (attached as Appendix "A"). This Court remanded the cause (attached as Appendix "B"). After remand from this Court, the Court of Criminal Appeals again affirmed the sentence of death (attached as Appendix "C"). The Court of Criminal Appeals, however, granted the Respondent's motion for rehearing and subsequently reversed the sentence of death (attached as Appendix "D"). The sole ground for reversal is the admission of Dr. Grigson's testimony. The State filed a motion for rehearing, which was denied (attached as Appendix "E"). Three dissenters filed a written dissent to the State's denial of rehearing (attached as Appendix "F"). Although the only error in the trial was contained in the punishment phase, under the laws of Texas the entire case must be retried.

REASONS FOR GRANTING THE WRIT

The Court of Criminal Appeals reversed the death sentence of Kerry Max Cook for the murder of Linda Jo Edwards because of the testimony of Dr. William Grigson which was admitted during the punishment phase of the trial. Dr. Grigson testified about the Respondent's potential for future dangerousness. The interview with the Respondent about which Dr. Grigson testified was not prefaced with *Miranda* warnings or notice to counsel. This decision warrants review by this Court for two reasons. First, the doctrine of *Estelle v. Smith*, 451 U.S. 454 (1981) should not be applied retroactively. Second, the Court of Criminal Appeals misconstrued the harmless error doctrine of *Chapman v. California*, 386 U.S. 18 (1967) and *Satterwhite v. Texas*, 486 U.S. 249 (1988).

I. The doctrine of *Estelle v. Smith*, which held that both the Fifth and Sixth Amendments are violated by a doctor's testimony on future dangerousness of the defendant when the opinion is based on questioning conducted without a prior warning on the Fifth Amendment privilege and without opportunity for advice of counsel, should not be applied retroactively.

This Court has never spoken on the issue of whether *Estelle v. Smith* should be applied retroactively. Retroactive application is not compelled, constitutionally or otherwise. *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). This Court has held that other doctrines involved in Fifth Amendment and Sixth Amendment jurisprudence should not be applied retroactively.[2] The State contends that *Estelle v. Smith* should be treated like these cases and should not be applied retroactively.

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[2] *See, e.g., Tehan v. United States ex rel Shott*, 382 U.S. 406 (1966) (declined to apply *Griffin v. California*, 380 U.S. 609 [1965], a Fifth Amendment self-incrimination case, to state cases finalized before that decision was delivered); *Jenkins v. Delaware*, 395 U.S. 213 (1969) (holding that *Miranda* standards do not apply to post-*Miranda* retrials of cases originally tried prior to that decision); *Johnson v. New Jersey*, 384 U.S. 719 (1966) (holding that *Miranda* affects only those cases in which the trial began after the date of the decision); *Stovall v. Denno*, 388 U.S. 293 (1967) (holding that decisions establishing the right to counsel at certain pretrial lineups are completely prospective); *Adams v. Illinois*, 405 U.S. 278 (1972) (holding that the decision establishing that the preliminary hearing is the "critical stage" at which the accused is entitled to assistance of counsel is *not* retroactive); *Solem v. Stumes*, 465 U.S. 638 (1984) (holding that *Edwards v. Arizona*, 451 U.S. 477 [1981] does not apply retroactively to a state court conviction finally affirmed by the State Supreme Court before *Edwards* was decided).

This Court said in *Griffin v. Kentucky*, 479 U.S. 314 (1987), that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases pending on direct review with no exception for cases in which the new rule constitutes a "clear break" with the past. The Petitioner respectfully disagrees with the opinion of the majority. The Petitioner instead urges this Court to adopt the reasoning of the dissenting opinon of Justice White in that case, who urged the Court to apply the *Stovall* test to determine retroactivity. *Griffin, supra* 334 (White, J., dissenting).

This Court set out the criteria for determining retroactivity in *Stovall v. Denno*, 388 U.S. 293, 297 (1967). As this Court noted:

> " . . . [the] criteria guiding resolution of the [retroactivity] question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards".

As this Court further noted in *Solem v. Stumes*, 465 U.S. 638 (1984), retroactive effect is most appropriate "where a new constitutional principle is designed to enhance the accuracy of criminal trials." *Supra* at 643. The present case is analytically very similar to *Solem v. Stumes*. The *Estelle v. Smith* doctrine has only a "tangential relationship to truthfinding at trial." *Solem, supra* at 643. The absence of a lawyer or *Miranda* warnings does not mean the statements a defendant makes in response to a psychiatric interview will be inaccurate or unreliable.

The Fifth Circuit is the only federal circuit which has directly examined the issue of retroactivity of *Estelle v. Smith*. It concluded that the decision should be applied

retroactively. *See Battie v. Estelle*, 655 F.2d 692 (1981) and *White v. Estelle*, 720 F.2d 415 (1983).

These decisions, which came prior to this Court's decision in *Solem v. Stumes, supra*, are flawed for several reasons. *Battie* contravenes the reasoning of this Court's other retroactivity doctrine. *Battie* did not consider the relationship between the *Estelle v. Smith* doctrine and the truthfinding function of the trial process. *Battie* also failed to consider the extent to which the State relied on psychiatric testimony in criminal trials. Before *Estelle v. Smith*, the State often used psychiatric testimony to prove future dangerousness in capital trials. Such use indicates that the extension of *Miranda* to the mental health care profession was not foreshadowed or forewarned. Further, the administration of justice is not served by the retroactive application of *Estelle v. Smith* to every capital trial which employed psychiatric testimony.

Although the Fifth Circuit is the only federal circuit court to directly consider whether the *Estelle v. Smith* decision should be applied retroactively, the Eleventh Circuit has arrived at a slightly different conclusion on the foreseeability issue.[3] In *Alvord v. Wainwright*, 725 F.2d 1282, 1293 (1984), the Eleventh Circuit concluded that a defendant could not win an ineffectiveness of counsel claim on the ground that his attorney did not anticipate the *Estelle v. Smith* claim at trial or on appeal. That Court's opinion seems to suggest that the *Estelle v. Smith* decision was not foreseeable or foreshadowed by this Court. *Alvord, supra.*

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[3] The Eleventh Court of Appeals has determined that *Estelle v. Smith* is not "new law" for writ of habeas corpus purposes. *See Moore v. Zant*, 885 F.2d 1497 (1989).

II. In determining that Dr. William Grigson's testimony on future dangerousness was not harmless error, the Court of Criminal Appeals erred by misapplying the harmless error rule of *Chapman v. California* and *Satterwhite v. Texas*.

This Court has determined that the harmless error rule applies to the admission of psychiatric testimony in violation of the Sixth Amendment right set out in *Estelle v. Smith, id.*, noting that a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected the capital sentencing jury. *Satterwhite v. Texas, supra* at 1798.

The harmless error rule is that if the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict, then the error is harmless and the verdict may stand. *Chapman v. California, supra* at 828. So the question in the case at bar is whether the State has proved beyond a reasonable doubt that Dr. Grigson's testimony did not contribute to the verdict.

In the Court of Criminal Appeals' latest decision, the Court held that the State could not prove beyond a reasonable doubt that Dr. Grigson's testimony did not contribute to the verdict and reversed the death sentence given to the Respondent. This decision was reached in *Cook v. State*, No. 63,643 (Tex.Cr.App. 1991, slip op.) (attached as Appendix "C"), on the basis of *Satterwhite v. Texas, supra*, where this Court found it impossible to say beyond a reasonable doubt that Dr. Grigson's testimony on future dangerousness did not influence the sentencing

jury. The State contends, however, that the Court of Criminal Appeals misapplied the federal harmless error rule of *Chapman v. California, supra* and *Satterwhite v. Texas, supra,* and that no reversal is necessary in this case.[4]

On the issue of Dr. Grigson's testimony, the Court of Criminal Appeals previously determined that there had been no compliance with the Fifth and Sixth Amendment requirements set out in *Estelle v. Smith, supra,* that a defendant be given *Miranda* warnings and that defense counsel be given advance notice of a psychiatric examination encompassing the issue of future dangerousness. See *Cook v. State, supra* at 928, 944-45. The Court of Criminal Appeals has reached conflicting decisions about the impact and scope of this error, however.

THE COURT OF CRIMINAL APPEALS INCORRECTLY EVALUATED THE STANDARD OF HARMLESS ERROR.

The State contends that the Court of Criminal Appeals incorrectly evaluated the harm of the error committed. The Court of Criminal Appeals concluded that the State could not prove beyond a reasonable doubt that the "jury did not consider Dr. Grigson's testimony on future dangerousness when it arrived at its finding". The Court of Criminal Appeals relied on this Court's decision in *Satterwhite v. Texas, supra,* in employing this analysis. The

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[4] The state court opinion cited federal harmless error cases and the opinion did not clearly state that it was relying exclusively on state law. Thus, it must be presumed that the Court's opinion rested on federal law. *Michigan v. Long,* 463 U.S. 1032, 1042 (1983).

Court of Criminal Appeals simply relied on the superficial similarities between the facts of *Satterwhite* and the facts of this case. The result of this decision is a confusing standard on harmless error. It is the position of the State that the standard enunciated is faulty; and that this standard, which can never be met by the State, produces an unjust and judicially inefficient result.

In past decisions, this Court construed its harmless error standard to mean that if the evidence in the trial was overwhelming or cumulative, the error committed was "harmless" and the conviction would be upheld. *Rose v. Clark*, 478 U.S. 570 (1986); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Milton v. Wainwright*, 407 U.S. 371 (1972); *Schneble v. Florida*, 405 U.S. 427 (1972). These cases have never been overruled; *Satterwhite* did not mention them. This Court recognized that the purpose behind the harmless error rule was the promotion of economic and judicial efficiency. As this Supreme Court noted in the *Van Arsdall* decision:

> "The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence and promotes public respect for the criminal process by focusing on the underling fairness of the trial rather than on the virtually inevitable presence of immaterial error." 475 U.S. 673, 681 (1986).

In *Satterwhite*, this Court shifted its emphasis of harmless error from examining the error in the context of the weight of properly admitted evidence, back to the scope and impact of the erroneously admitted evidence. This is a significant departure, because it requires the

State to prove a negative – that the error did not irreparably taint the proceedings. This Court did not overrule its previous decisions which permitted the courts to examine the error in the context of the other evidence, nor did it provide any real guidelines for fleshing out this new standard. In fact, *Satterwhite* stands out as an aberration and an anomaly to this Court's other opinions on harmless error. In turn, the Court of Criminal Appeals interpreted *Satterwhite* as requiring an inquiry into the singular impact of Dr. Grigson's testimony on the jury.

The State contends that this is the wrong inquiry. First, it is impossible to know the effect of one specific piece of evidence or witness on the jury. The jury is not permitted to reveal any of the deliberative or mental processes it used in reaching its verdict. Thus, the State can never satisfactorily meet this burden. The entire purpose behind the harmless error rule, judicial efficiency, is defeated if the analysis used is so demanding that the State can never meet it.

This is also an inefficient and unjust standard. By focusing on the error and its potentially endless ramifications, the Court ignores all of the other evidence which clearly indicates that the Respondent was guilty. Lost in the Court of Criminal Appeals' analysis is the idea that a criminal trial is a process that is designed to produce a reliable and fair result. The fairness of a trial is not impaired by a constitutional error that has had no effect on the finding of guilt. See *Strickland v. Washington*, 466 U.S. 668 (1984). Also lost in the Court of Criminal Appeals' analysis is the concern for public respect of the criminal appellate process, which was expressed by this Court in the *Van Arsdall* decision.

IN DETERMINING THAT DR. WILLIAM GRIGSON'S TESTIMONY ON FUTURE DANGEROUSNESS WAS NOT HARMLESS ERROR, THE COURT OF CRIMINAL APPEALS ERRED BY IGNORING THE EVIDENCE PROPERLY ADMITTED DURING THE GUILT/INNOCENCE PHASE OF THE TRIAL.

As Lieutenant Collard testified, this murder was particularly gruesome. The evidence revealed that the Respondent mutilated Linda Jo Edwards's body, before her death occurred, in a deviant and horrifying manner. The jury was allowed to hear several witnesses testify about the nature and extent of the mutilation and they were also permitted to see pictures of Linda Jo Edwards' dismembered and battered body. There was no mutilation in the *Satterwhite* case. Yet, the Court of Criminal Appeals ignored the obvious impact of this devastating and critical testimony in determining that Dr. Grigson's testimony terminally tainted the trial. The State contends that this evidence deserves the Court's attention and should not be summarily dismissed. Further, the State argues that the evidence properly admitted during both phases of the trial was so overwhelming and cumulative that, beyond a reasonable doubt, the tainted evidence, which in contrast is rather insignificant, did not contribute to the jury's verdict.

Texas law certainly does not require the admission of psychiatric testimony in a capital murder trial. In addition to the evidence that was presented to the jury in the penalty phase, the jury is allowed to take into consideration all the evidence submitted, including the evidence in the guilt stage, in determining what penalty to assess

against the Respondent. *Pyles v. State*, 755 S.W.2d 98 (Tex.Cr.App. 1988).

The circumstances of the offense, if severe enough, can be sufficient for an affirmative answer to the question of future dangerousness. *Landry v. State*, 706 S.W.2d 105 (Tex.Cr.App. 1985); *Holloway v. State*, 691 S.W.2d 608 (Tex.Cr.App. 1984). In fact, the facts and circumstances surrounding a murder may be more probative than any other evidence regarding the issue of future dangerousness presented at the penalty phase of the trial. *Kunkle v. State*, 771 S.W.2d 435 (Tex.Cr.App. 1986).

There is ample evidence to prove beyond a reasonable doubt that the error of admitting Dr. Grigson's testimony did not contribute to the verdict in the Respondent's case. Many differences exist between Respondent's case and *Satterwhite*, which seems to be the basis for the Court of Criminal Appeals' latest decision.

The State contends that the grotesque sexual mutilation in this case distinguishes it from the *Satterwhite* case and is alone indicative of future dangerousness. No mutilation occurred in the *Satterwhite* case. Despite the cold calculation with which Satterwhite murdered his victim, the lack of any pre or post mortem sexual mutilation is significant. As the Court of Criminal Appeals noted in its second decision affirming the Respondent's conviction, "if . . . antisocial conduct and senseless acts can be gauged by degrees then Cook's murder was even more atrocious" [than the murder committed by Satterwhite]. *Cook v. State*, No. 63,643 (Tex.Cr.App. 1990, slip op., withdrawn) (attached as Appendix "C"). The jury found the Respondent guilty of this heinous crime. While the State

produced a psychiatrist and a psychologist to testify, this was not necessary to sustain a conviction.[5]

Further, the testiony of Dr. Grigson in the Cook trial differed from his testimony in the *Satterwhite* trial. His testimony in this case was nowhere near as forceful or assertive as that which he gave in *Satterwhite*. The State in the *Cook* case referred to Dr. Grigson's testimony in its final argument by making only a passing reference to it.

Since the facts of this case alone would have been sufficient to support an affirmative answer to the second issue if Dr. Grigson had not testified, it can hardly be said that his evidence added anything to the jury's decision. A psychiatrist or a psychologist is not required to determine that a person who would murder and sexually mutilate another person, and then remove her sexual organs, is a deviant who should be removed from civilized society. By disregarding this critical evidence as if the mutilation did not happen or did not matter, the Court of Criminal Appeals not only miscalculated the federal harmless error standard but it has also callously ignored the pain and suffering endured by Linda Jo Edwards and her family. Because of all the evidence the jury heard, both in the guilt and penalty phase, this Court should grant the State's petition, and determine that the State proved beyond a reasonable doubt that the erroneous admission

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[5] Texas law states that psychiatric testimony is not essential to support an affirmative answer to the question of future dangerousness. *Carter v. State*, 717 S.W.2d 60 (Tex.Cr.App. 1986); *Mitchell v. State*, 650 S.W.2d 801 (Tex.Cr.App. 1983); *Williams v. State*, 668 S.W.2d 692, 695 (Tex.Cr.App. 1983).

of the psychiatric testimony did not contribute to the verdict of death.

In the present case, the Court of Criminal Appeals found nothing wrong with any of the proceedings of the guilt/innocence phase of the trial. Indeed, a plethora of evidence was introduced at both phases of the trial which is more than sufficient to support the jury's findings and verdict. Yet the State is forced to retry this entire fourteen year old case for a mistake which was not considered improper at the time of the trial. Since the trial, witnesses have moved, at least one witness has died, and another witness has disappeared. The cost of this retrial will no doubt be exorbitantly expensive and extensively taxing on the financial resources of this county. Another factor which has been overlooked is that any retrial will be excruciatingly difficult for the family of Linda Jo Edwards. Her family will be forced to relive her horrifying last hours and the pain and indignity that she endured. Such a result is not fair, nor just, and it is certainly not necessary.

The State maintains that this Court should review the analysis that the Court of Criminal Appeals used in determining that the State could not prove beyond a reasonable doubt that Dr. Grigson's testimony was harmless error. The State urges this Court to adopt a more fair and equitable standard for determining harmless error. Absent Dr. Grigson's testimony, there was ample evidence properly admitted that can sustain the verdict reached in this case. The evidence supporting the affirmative finding of future dangerousness is compelling and overwhelming. Because the harmless error rule applies in this case but was misapplied by the Court of Criminal

Appeals, this Court should review the doctrine of harmless error and remand this cause to the Court of Criminal Appeals. The sentence of death should be affirmed.

CONCLUSION

For the reasons stated herein, a writ of certiorari should be granted in this case. The judgment of the Court of Criminal Appeals should be reversed and the case should be remanded to that court for further proceedings.

Respectfully submitted,

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APPENDIX "A"

Kerry Max COOK, Appellant

v.

The STATE of Texas, Appellee.

No. 63643.

Court of Criminal Appeals of Texas,
En Banc.

Dec. 9, 1987.

Defendant was convicted in the 241st Judicial District Court, Smith County, Glenn S. Phillips, J., of capital murder, and he appealed. The Court of Criminal Appeals, Onion, P.J., held that: (1) trial court did not err in overruling pretrial motion to require State to elect which count of indictment it expected to prosecute; (2) evidence was sufficient to support conviction; (3) evidence supported finding that defendant made his oral statement to fellow prisoner after effective date of statutory amendment allowing admission of such statement; (4) defendant was not denied speedy trial; (5) defendant's Fifth and Sixth Amendment rights were violated at penalty stage of capital murder trial by admission of psychiatrist's testimony; and (6) admission of psychiatrist's tainted testimony on future dangerousness at penalty stage was harmless.

Affirmed.

Clinton, J., filed a dissenting opinion.

Harry R. Heard, on appeal only, Longview, for appellant.

Hunter B. Brush, Dist. Atty., and Christian Harrison, Asst. Dist. Atty., Tyler, Robert Huttash, State's Atty., Austin for the State.

Before the Court en banc.

OPINION

ONION, Presiding Judge.

This is an appeal from a conviction for capital murder. After finding appellant guilty, the jury returned affirmative findings to the special issues submitted under Article 37.071(b)(1), (2) and (3), V.A.C.C.P. The trial court assessed the mandatory death penalty.

On appeal appellant raises numerous points of error, some of which involve the sufficiency of the evidence. We turn first to a review of the facts.

In June, 1977, 21-year-old Linda Jo Edwards, the deceased, was working as a secretary in the English Department of Texas Eastern University in Tyler. According to the testimony of her friend Paula Rudolph, Edwards had been living with Rudolph at the Embarcadero Apartments, No. 169, in Tyler for about two weeks. Although the apartment lease was in Rudolph's name, Edwards had been registered with the apartment office as a guest. According to Rudolph no one else had a key to the apartment. At the time, Edwards had a regular boyfriend named Jim Mayfield who was Dean of the Learning Resource Center at Texas Eastern University. Edwards was not known to be dating anyone else, and Mayfield had been to the apartment to visit Edwards only once.

On the afternoon of June 9, 1977, Rudolph got off work at 5:00 p.m. and went to the stables to go horseback riding, arriving at her apartment at approximately 8:30 p.m. While Rudolph was eating and watching television Edwards came in around 9:30 p.m., and the two chatted for a few minutes. Rudolph testified that Edwards was "happy, laughing," and not at all depressed. Rudolph left the apartment at 10:30 p.m. for a date and stayed out for about two hours.

Upon returning to her apartment between 12:30 a.m. and 12:45 a.m., Rudolph found the front door closed but unlocked. As she entered, Rudolph saw the figure of a man in Edwards' bedroom. Rudolph testified that the light in the bedroom was very bright, and the figure was turning and in motion when she saw it. As the figure whirled it stepped out of Rudolph's line of vision and shut the door. Rudolph described the figure as "about my height, very tanned . . . wearing what appeared to me in the light white shorts. There was a definite band of white across the lower torso into the top of the leg." Later, on cross-examination, she testified:

> " . . . for those moments as I was closing the door, you know, after the figure whirled, we stood there face to face. I began moving and he began moving almost at the same time."

Rudolph also testified the man had a broad, flat face, that he was slim-hipped and slim-chested, but had fairly broad shoulders for his size. At trial Rudolph identified appellant as the person she had seen, basing her identification upon seeing him on the night of June 9, 1977. Furthermore, Rudolph testified that she had never seen appellant before that night, and that to her knowledge he

had never had anyone's permission to be inside her apartment.

As Rudolph entered her apartment that night, simultaneously seeing the figure in Edwards' bedroom, she called out: "Don't worry, it's only me." Rudolph testified that she said this thinking Edwards' boyfriend Jim Mayfield was in the apartment, and that she had no reason whatsoever to believe it was anyone else. Still, she was not completely satisfied that it was Mayfield since it did not really look like him. Rudolph laid down her purse and lit a cigarette, puzzling over the fact that the figure did not look like Mayfield. However, that was the only explanation she could come up with. As she was thinking, Rudolph heard the sliding patio door open and close. Thereafter Rudolph got ready for bed and went to sleep around 12:50 a.m. The next morning at about 7:00 a.m. Rudolph discovered Edwards' mutilated body and summoned the authorities.

During the course of the same evening on June 9, 1977, appellant and Robert Hoehn spent approximately two hours together in the apartment where appellant was staying with James Taylor in the Embarcadero Apartment complex. Testifying for the State but out of the presence of the jury, Hoehn, a 42-year-old homosexual hairdresser, related how appellant had called him several times asking him to bring over some beer. Hoehn arrived at the apartment between 10:35 p.m. and 10:45 p.m. at which time appellant was watching a movie on television entitled "The Sailor Who Fell From Grace With the Sea." After approximately five minutes, appellant suggested they go outside to the pool, where they stayed some 20 to 25 minutes. They later returned to the apartment to watch

the remainder of the film. By this time it was about 11:45 p.m. The two then drove to a nearby Kroger Store to buy cigarettes, after which Hoehn dropped appellant off at his apartment.

The trial court permitted the showing of that portion of the film or movie that was seen by Hoehn in appellant's presence, both when Hoehn arrived and when the two came back to the apartment from the swimming pool.

Hoehn testified that on their way to the pool he and appellant passed by Edwards' bedroom window. Appellant said there was a good-looking girl there and tried to get Hoehn to look, but Hoehn refused. Hoehn stated appellant did not make any remarks about what he had seen in the girl's bedroom, and that appellant did not get close enough to look into the window that night. Upon returning to the apartment the two men drank some beer and resumed watching the movie. At one point Hoehn left the room where the television was located to use appellant's bathroom. When Hoehn returned to watch the movie he saw appellant come from the kitchen with an eight-inch, serrated bread knife, saying "Let's cut it up or cut it out." Hoehn told him to put the knife down and appellant cooperated. Hoehn testified that he took it in a very "jokingly manner."

The film depicted the mutilation of a cat. Although the jury did not see the cat mutilation scene, it did see that part of the film where children poured a drugged mixture of milk down a cat's mouth to anesthetize it, as well as the final portion of the film where boys gather a cleaver, large butcher knives and other sharp instruments, take them in satchels and sacks up a hill with the

sailor and anesthetize him with drugged tea. They prepare to mutilate him by putting on surgical gloves and gather closely around him with their knives. Appellant's remarks about "cutting it up" or "cutting it out" evidently mimicked what was being shown in the movie.

Hoehn testified there were portions of the film that were missed because he and appellant were having "sexual relationships." Upon returning from the pool Hoehn performed fellatio on appellant. Hoehn did not remember much about the movie after appellant made his "joke" with the knife he had brought out from the kitchen, because at that point he started to "play with Kerry a little bit. . . . " Hoehn testified that he performed oral sex on appellant's anus "at intervals" while he lay facing the television. Hoehn recalled this was happening toward the end of the movie after the children had drugged the sailor and he was going to sleep. Hoehn stated that by this time his part of the sex act was consummated, and appellant then tried to have anal intercourse with Hoehn, failed, and then masturbated himself to a climax. On cross-examination Hoehn testified that the film ended around 11:45 p.m. and that they left the apartment around 12:00 or 12:05 a.m. for cigarettes. Hoehn returned appellant to the apartments' parking lot around 12:30 a.m. or 12:35 a.m.

Hoehn testified that on the night in question appellant wore a pair of "tennis style-type shorts" and over those a pair of blue pants. Appellant introduced a pair of gym shorts into evidence and asked Hoehn if they were the same color as those appellant wore the night of June 9, 1977. Hoehn replied the ones he saw then had a "blue body and a red stripe around the waist and down the

leg." Hoehn also testified on redirect that appellant frequently wore this type of gym short, and that he lounged around in them.

One of the policemen who investigated the murder scene on June 10, 1977, was Lt. Doug Collard of the Tyler Police Department. He viewed the body of the deceased lying on the floor, and testified throughout with the aid of slides made from photographs taken at the scene. The body was nude from the waist down and there were pieces of plaster under and around the body. A pair of shoes, panties and blue jeans lay beside the deceased's feet. The panties had been cut across the crotch and up one side. A stocking was on one leg, while the other was missing and never found. The brassiere and blouse had been cut up the middle and pulled aside, and there were several places in the brassiere and blouse that had been cut through with a sharp instrument. An earring lay next to the deceased's right hand, still attached to the right ear lobe that had been completely torn loose.

The body had been severely mutilated. Lt. Collard described how the right breast had a large stab wound, and that the blood on the body indicated "rub marks" or "smear marks, motion marks." There were multiple wounds in the vaginal area, as well as in the throat area. On the lower right side of the lip, one quarter of the lip was missing, and there was a long laceration from the edge of the mouth into the cheek area. A quantity of hair from the upper right-hand top of the head had been removed. According to Collard, the entire vagina had been cut out, leaving a large cavity that extended deep into the body. The missing part of the lip and the vaginal parts were never found. A small quantity of hair was

discovered at the scene, however, the rest was never found. There were also three stab wounds in the back of the deceased.

Lt. Collard deducted that a plaster statute with quantities of plaster broken loose had been used to strike the deceased. There were particles of plaster in the hair of the deceased and on the bed next to a blood stain on the bedspread, indicating the deceased had been lying on the bed when struck by the statue. Lt. Collard found no evidence of a struggle in the bedroom, nor did he find any defensive marks on the deceased that would indicated that she offered any resistance against her attacker.

The physical evidence introduced included the plaster statute, various parts of the deceased's clothing, the bedspread and pillow, a French carving knife, and a pair of scissors.

After qualifying Collard as an expert witness in fingerprint analysis, the State placed in evidence a "faint impression" lifted from the scissors. However, this print was too faint for comparison because at the time of discovery the scissors were covered with blood almost up to the pivot screw, and motion had disturbed the print. Although the police lifted fingerprints from all over the apartment, the only ones that did not match the deceased's or Paula Rudolph's prints were three found on the patio door. Two were inside the patio door, but were insufficiently detailed to make a comparison. The third was found on the outside edge of the patio door about 56 inches above the base of the door. This print depicted the entire middle finger and part of the ring and little fingers

of the left hand. Collard testified that he found no dissimilar characteristics between that print and prints taken from appellant when he was taken into custody. In his opinion the print from the patio door belonged to no other person than appellant. It was also Collard's opinion that the print was approximately six to twelve hours old. This means the print could have been lift between 8:00 p.m. on June 9, 1977, and 8:00 a.m. the next morning.

Collard also testified that the print was made as the door was being closed, and he concluded that appellant would have been closing the door behind him as he entered the apartment. Collard found a "smear pattern" at the corresponding point where the left thumb would have touched the door.

Dr. V.V. Gonzalez, M.D., a pathology specialist, testified that on June 10, 1977, he examined the body of the deceased at the murder scene at 9:30 a.m. and later performed an autopsy at a funeral home at 11:30 a.m. His observation revealed the following:

Multiple lacerations to the head, with one laceration "rather deeply penetrated to the entire scalp so that the scalp has been exposed and is gaping open." There was an injury to the left eye and massive hemorrhaging underneath the scalp, with multiple contusions, injuries and bruises on the back part of the brain. Dr. Gonzalez theorized that the deceased had been knocked out, and the injuries to the gums with bits of plaster embedded in the teeth indicated that a plaster of paris statue had been used to knock the deceased unconscious. Gonzalez testified that this plaster material was identical to the material

of the statue, and that the blow was not enough to kill the deceased.

Dr. Gonzalez also testified that part of the lip had been snipped away by scissors, which had also been used to inflict lacerations to the neck. A large carving knife was probably used to cause a deep cut that severed the internal carotid artery and another that cut the jugular vein. Gonzalez also described four stab wounds to the back, two of which lacerated the diaphragm. One completely severed the tenth rib and lacerated the diaphragm, while another lacerated part of the lung. Because of the wide laceration of the diaphragm, the spleen, stomach and part of the intestine were located up to the left chest cavity, and approximately 500 cc. of blood had oozed into the left pleural cavity through these wounds.

Gonzalez testified that there were three wounds in the pubic region, one of which was three or four inches deep that had lacerated the left side of the urinal bladder in the pelvic cavity. The pelvic cavity was filled with blood. Dr. Gonzalez testified, "So with this amount of blood, I can assume that this wound was inflicted when this lady was still alive because of the amount of blood that has penetrated through the bladder." There were also multiple lacerations in the perineal region, probably inflicted with scissors, such that:

> "[T]he wall that separates the vagina with that of the rectum is completely lacerated or mutilated so that there is a communication with the vagina wall with that of the pelvic cavity and with that of the rectum."

Multiple "snipping and lacerations" had removed parts of the wall of the vaginal canal, which were not found at the scene. Gonzalez finally testified that three shallow wounds and one deep wound had been inflicted on the right breast, completely transepting the seventh and eighth rib and penetrating the liver. Gonzalez stated, "a sharp edged weapon or knife will be indicative of this type of wound."

The body was in a condition of rigor mortis that would indicate the deceased had been killed between 10 to 12 hours before, plus or minus two or three hours. Death was caused by the cutting of the carotid artery and jugular vein. The lacerations in the vaginal area were so extensive and the bleeding so profuse that the autopsy showed no evidence of semen or acid phosphatase to indicate rape. Gonzalez indicated he was not, however, able to "rule out with definite certainty that rape was performed –."

The State successively called Rodney Dykes, age 13, and Randy Dykes, age 18. Both had visited their Uncle James Taylor at his Embarcadero apartment one or two days before the murder. Appellant had been staying there for about two weeks. Both of the Dykes testified that appellant related that one night he was passing by a window with the curtains open and saw a girl undressing and "playing with herself." [It should be noted that in the film "The Sailor Who Fell From Grace With the Sea" one of the scenes appellant saw, and which was also viewed by the jury, depicted a dark-haired woman sitting undressed before her bedroom mirror, masturbating.] Appellant had pointed the window out to the Dykes, and it was identified as the deceased's bedroom window.

Randy Dykes testified he picked up appellant at about 10:00 a.m. the day after the murder to take him to look for a job. While driving along they heard news on the radio concerning the murder and its investigation. Dykes stated appellant looked "somewhat shocked" when the broadcast came on. The two drove to where the first job application had been filed, but then appellant changed his mind and had Dykes drive him to Jacksonville. Dykes testified that before driving appellant to Jacksonville they stopped at the Embarcadero Apartments where appellant picked up a large grocery bag that was a little less than halfway rolled over. Although Dykes did not see appellant pack any cloths, appellant had indicated he wanted to stop by the apartment to pick up some clothes because he was going to spend the night.

A hearing was held outside the presence of the jury to determine the admissibility of an oral statement made by appellant to Edward Scott Jackson while in Smith County Jail. The trial judge ruled that any statements and conversations had between appellant and Jackson were voluntarily made, and therefore Jackson's testimony was admissible.

Jackson, a 22-year-old inmate of the Smith County Jail, testified in the presence of the jury that he met appellant at the jail in late August, 1977. Jackson testified that between the second and the fifteenth of September he and appellant were looking at a Hustler magazine, when appellant made certain remarks about some of the dark-haired women depicted there. Jackson stated, "He would made a comment like I would like to fuck her hard or this bitch needs her ass kicked – for posing like this." At this point Jackson recalled appellant was acting "like a

nut . . . He was hiked up," and that "he acted a little crazed, wild." Jackson further testified:

> "*I asked* him soon afterwards *if he was guilty of what he was charged with* and he answered my question with a question asked to me was I guilty and I told him, no, and he said, 'Edwards, I trust you, man.' He said, 'I have never told anybody else this so please don't repeat it.' *He told me that he had* – and went further – " (Emphasis supplied.)

Further questioning of Jackson elicited the following:

> "A He said that he killed her and he went further into details.
>
> "Q Go into those details for the Jury, please?
>
> "A He said that he had stabbed her in several places.
>
> "Q Did he tell you the places he had stabbed her?
>
> "A One in particular, he said that he cut along her hairline in between her legs a V shape and that he gouged her several times.
>
> "Q Did he tell you where he gouged her?
>
> "A In her vagina, he said he had cut pieces out. He said he cut some hair from her head. He gested (sic) that – made gestures of stabbing her."

Appellant also told Jackson that upon leaving he thought he had been seen by a young lady.

In his defense appellant called three witnesses, all inmates of the Smith County Jail, to give impeaching

testimony about Jackson. Witness Fomby basically testified that Jackson's testimony was self-serving, that he saw this as his "ace in the hole" in order to reduce his charge from murder to involuntary manslaughter. Witness Evans testified that Jackson told him he was not going to tell the truth in the proceeding against Kerry Cook. Finally, witness Sewell stated that Jackson had told him "that they had not made a deal and that he was going to get a deal before he would ever testify." The jury, by its verdict, chose to give this testimony little or no weight. Furthermore, the trial judge instructed the jury to disregard the testimony of a fourth witness, to which appellant made no objection.

After deliberations, the jury returned a general verdict of "guilty of the offense of capital murder as charged in the indictment." During the punishment phase of the trial the State brought on 13 character witnesses who were acquainted with appellant's reputation in the community for being a peaceable and law-abiding citizen. Each testified that such reputation was bad.

Lt. Collard testified that appellant had been convicted of theft on October 13, 1973, and sentenced to two years in the Texas Department of Corrections.

Dr. James P. Grigson, a psychiatrist, and Dr. Jerry Landrum, a clinical psychologist, both testified on the issue of future dangerousness. They both concluded that appellant would continue to be a threat to society.

Appellant offered no evidence at the punishment phase of the trial. After hearing argument from both sides, the jury retired to deliberate, returning answers of "yes" to all three special issues under Article 37.071,

V.A.C.C.P. The trial court assessed the mandatory death penalty.

Appellant contends that the trial court erred in overruling his pretrial motion to require the State to elect which count of the indictment it expected to prosecute.

The indictment contained six counts of capital murder. It alleged the appellant murdered the deceased while in the course of committing (1) aggravated rape, (2) aggravated sexual abuse, (3) burglary of a habitation with intent to commit aggravated rape, (4) burglary of a habitation with intent to commit aggravated sexual abuse, (5) burglary of a habitation with intent to commit theft, and (6) burglary of a habitation with intent to commit aggravated assault.

Several months before trial the pretrial motion requiring the State to elect was overruled.

In *Franklin v. State*, 606 S.W.2d 818, 821 (Tex.Cr. App.1979) (opinion on original submission), this Court wrote:

> "Where only one transaction is charged, and different counts are contained in the indictment to meet possible variations of proof, the State is not required to elect upon such counts. Nor may an election be compelled where different counts charging the same offense are drawn to prevent a variance and there is evidence to support each count. *Floyd v. State*, 164 Tex.Cr.R. 50, 296 S.W.2d 523 (1956); *Smith v. State*, 141 Tex.Cr.R. 387, 148 S.W.2d 844 (1941)."

See also *Williams v. State*, 680 S.W.2d 570, 574 (Tex.App. – Corpus Christi 1984).

> "The other three counts of the indictment charge the same acts in more detail and with slight variations. An indictment may contain as many counts charging the same transaction as the drafter deems necessary to meet variations in the proof. *Ex parte Easley*, Tex.Cr.App. 490 S.W.2d 570 . . . Where several ways an offense may be committed are set forth in a statute and are embraced in the same definition, are punishable in the same manner, and are not repugnant to each other, they are not distinct offenses, and may be charged in the same indictment." (Citations omitted.) *Jurek v. State*, 522 S.W.2d 934, 941 (Tex.Cr.App. 1975), aff'd 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). See V.T.C.A., Penal Code, § 19.03.

The Court did not err in overruling the pretrial motion to require the State to elect. It is observed that at the commencement of the trial the State waived and abandoned the count alleging that the murder was committed during the course of committing aggravated sexual abuse.

In at least six of his points of error in one measure or other appellant attacks the sufficiency of the evidence to sustain the allegations of any of the five counts of the indictment submitted to the jury. He contends there is a fatal variance between the allegata and the probata and the conviction cannot be sustained on any count.

In *Bailey v. State*, 532 S.W.2d 316, 322-323 (Tex.Cr. App.1976), this Court wrote:

> "In his sixth ground of *error*, appellant contends the trial court erred *in submitting all six*

> *counts* of the indictment to the jury, *in that there was no evidence to support three of the counts*
>
> . . .
>
> *"Where a general verdict is returned and the evidence is sufficient to support a finding under any of the counts submitted, no error is shown. Hintz v. State,* Tex.Cr.App., 396 S.W.2d 411; *Cavazos v. State,* Tex.Cr.App., 365 S.W.2d 178." (Emphasis supplied.)

See also *McArthur v. State,* 132 Tex.Cr.R. 447, 105 S.W.2d 227 (App.1937). See further *Tapley v. State,* 673 S.W.2d 284, 289 (Tex.App. – San Antonio 1984).

In the instant case each count submitted to the jury differed from the other by alleging a different mode by which the singular offense was committed. The verdict returned was a general one. See Article 37.07, V.A.C.C.P.

Therefore we must determine if any of the counts submitted are supported by evidence to support the general verdict.

One of the counts in the indictment submitted alleges that appellant caused the death of deceased in the course of committing burglary of a habitation with intent to commit aggravated assault. The evidence was sufficient to sustain a finding that appellant caused the death of deceased. This is based on Dr. Gonzalez's testimony that deceased had been knocked unconscious, received multiple stab wounds, and was mutilated with a knife and scissors. Paula Rudolph testified she saw appellant in her apartment at the time of the crime. Fingerprint evidence also placed appellant in the apartment within the time the

crime was committed. Furthermore, appellant's oral statements to Jackson revealed how he committed the crime by stabbing the deceased, mutilating her sexually, and removing body parts. Appellant also related how he feared having been seen in the apartment by a young lady.

Appellant claims the State failed to prove the elements of burglary as set forth in V.T.C.A., Penal Code, § 30.02, because it did not show that appellant's entry into the apartment was forced and because the evidence failed to show that entry was made without the effective consent of deceased. Appellant stresses that the door was unlocked to support his contention.

Under the former 1925 Penal Code, Article 1394, the opening of a closed door was sufficient to constitute force and breaking. *Smith v. State*, 491 S.W.2d 678 (Tex.Cr.App.1973). Under V.T.C.A., Penal Code, § 30.02, force and breaking are no longer elements of the offense. Instead, only entry must be shown. See Practice Commentary to V.T.C.A., Penal Code, § 30.02.

The evidence is also sufficient to show that appellant entered the apartment. The record reflects that Paula Rudolph saw appellant in the apartment between 12:35-12:45 a.m. there was expert testimony that appellant's fingerprint was found on the patio door and that it was in such a position that he could only have left it while pulling the door shut as he entered the apartment. Appellant's statements to Jackson also place him inside the apartment.

In the indictment the State alleged ownership of the habitation in Paula Rudolph and that she did not consent

to the alleged burglary. It is encumbent upon the State to prove ownership and lack of consent as alleged in the indictment. *Araiza v. State*, 555 S.W.2d 746 (Tex.Cr. App.1977); *Smith v. State*, 638 S.W.2d 476 (Tex.Cr.App.1982). Rudolph testified that the apartment was her habitation, was rented to her and that she lived there with the deceased. She related she did not consent to the burglary by the appellant. Proof of ownership as alleged in the indictment and a showing of lack of consent by that person will support a conviction even though there are other persons who have an interest in the property or authority to give consent but who do not testify. *Little v. State*, 567 S.W.2d 502 (Tex.Cr.App.1978). Appellant seems to argue that the evidence is insufficient to show lack of consent because the State did not show that the deceased, who lived at the apartment, did not consent to his entry into habitation. This was a defensive matter which the State was not required to disprove. *Fletcher v. State*, 396 S.W.2d 393, 395-396 (Tex.Cr.App.1965).

Appellant also urges that the State failed to prove that the entry was with the intent to commit the felony offense of aggravated assault.

The question of intent with which a person unlawfully enters a habitation is a fact question for the jury to be drawn from the surrounding circumstances. *Stearn v. State*, 571 S.W.2d 177 (Tex.Cr.App.1978); *Robles v. State*, 664 S.W.2d 91 (Tex.Cr.App.1984). And the jurors are the exclusive triers of the facts, and judges of the credibility of the witnesses and the weight to be given to the evidence. *Esquivel v. State*, 506 S.W.2d 613 (Tex.Cr. App.1974). And when a question is raised concerning the sufficiency of the evidence the evidence must be viewed

in the light most favorable to the jury's verdict. *Combs v. State*, 643 S.W.2d 709 (Tex.Cr.App.1982). The standard for review in both circumstantial and direct evidence cases is whether, after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Wilson v. State*, 654 S.W.2d 465, 471 (Tex.Cr.App.1983) (Opinion on State's Motion for Rehearing).

The evidence, including Lt. Collard's discoveries at the scene and Dr. Gonzalez's autopsy report, etc., clearly show an aggravated assault. Appellant does not question this. Proof of intent may be shown by circumstantial or direct evidence.

Applying the "rational trier of fact" test we conclude, viewing the evidence in the light most favorable to the jury's verdict, that the evidence is sufficient to support the conviction for capital murder while in the course of committing a burglary of a habitation with the intent to commit aggravated assault as alleged in the sixth count of the indictment.

In view of the above and all the evidence, we overrule appellant's points of error concerning the submission of the other counts of the indictment to the jury. *See Bailey*, supra.

Appellant complains that the court erred in failing to grant his special requested charge on circumstantial evidence. No error is presented in light of *Hankins v. State*, 646 S.W.2d 191, 199 (Tex.Cr.App.1981) (Opinion on State's Motion for Rehearing). See also *Penry v. State*, 691 S.W.2d 636, 649 (Tex.Cr.App.1985).

Appellant further argues that the trial court erred when it permitted Edward Scott Jackson to testify before the jury about the oral statements appellant made concerning the alleged offense while both were in the Smith County jail as inmates.

Before the evidence was admitted the trial judge conducted a hearing to determine the voluntariness and admissibility of the statements. The admissibility of the statements turned on the time the statements were made in view of the 1977 amendments to Article 38.22, V.A.C.C.P., which became effective August 29, 1977. Under the 1967 version of Article 38.22, supra, in effect prior to that date, an oral statement made to fellow prisoners was inadmissible and failure to exclude such a statement at trial was reversible error, particularly if the statement was inculpatory. *Easley v. State*, 493 S.W.2d 199 (Tex.Cr.App.1973).

The 1967 version of Article 38.22, V.A.C.C.P., focused on "the oral or written confession of a defendant while the defendant was in jail or other place of confinement or in the custody of an officer." The 1977 version of the statute changed that focus as to an oral statement to "an oral statement of an accused made as a result of custodial interrogation." See and cf. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Section 5 of Article 38.22, supra, as amended, provided:

> "Sec. 5. Nothing in this article precludes the admission of a statement made by the accused in open court at his trial, before a grand jury, or at an examining trial in compliance with Articles 16.03 and 16.04 of this code, or of a statement that is the res gestae of the arrest or of the

> offense, or of a statement that does not stem from custodial interrogation, or of a voluntary statement, whether or not the result of custodial interrogation, that has a bearing upon the credibility of the accused as a witness, or of any other statement that may be admissible under law."

Thus it appears that if the statements were made to Jackson before August 29, 1977, Jackson's testimony was inadmissible, but admissible if made on August 29th or thereafter.

At the hearing to determine admissibility Jackson, who was charged with an unrelated murder, testified he first became acquainted with the appellant in "late August of '77" when appellant was placed in the Smith County jail where Jackson had been an inmate for some time; that appellant had first been placed in a side cell on the sixth floor while he was in the Federal Tank on the same floor; that since he was a trusty at the time he eventually got the jailer to transfer appellant to the Federal Tank. He testified that sometime between September 2 and 5, 1977 the appellant admitted he was guilty of the charge against him and described the details of the offense. Jackson stated that this admission was not made before September 2nd. He gave a sworn statement on October 18, 1977, to the officers about appellant's admissions.

On cross-examination Jackson testified it was between August 15 to 30, 1977,[1] when appellant was

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[1] The October 18th statement reflects Jackson's recollection that appellant was first placed in jail on August 10, 1977.

placed in the jail and confined in the side cell for about two weeks before the transfer to the Federal Tank. It was then about two weeks after the transfer that appellant made his admissions. Jackson recalled that appellant had gone to a "hearing" which appellant or other inmates later said was an examining trial and that appellant seemed relieved thereafter because the State's main witness related the man she had seen had silver hair. It was stipulated the examining trial occurred on August 19, 1977. Jackson couldn't remember whether the admissions were made before or after the "examining" trial, and could not remember any other "hearing" that appellant had while they were in the same tank or cell together.

Jackson's sworn statement of October 18th was introduced into evidence at the hearing. In the statement Jackson stated that appellant "had told me this" before Jackson "had to go to court" and upon his return to the cell seemed relieved because of the testimony. Jackson admitted the statement was "saying" appellant's admission came before "that hearing."[2] Jackson stated, however, that the killing was mentioned again "occasionally" before he (Jackson) was moved out of the same cell several weeks later, but not the details of the killing. Jackson could not recall just when the hearing took place, but the written statement of October 10th reflected that appellant was not moved into the Federal Tank until approximately August 24th.

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[2] It is clear that Jackson normally used "court" or "hearing" in his statement and testimony. He was only told that it was an examining trial.

On redirect examination Jackson reiterated that admissions were made to him by appellant between September 2nd and September 15th.[3]

Brad Berger, an administrative assistant to the Sheriff, testified that the jail records from June 29 until November 14, 1977, showing which inmates were in which cells were either missing or had not been kept for that period.

This was the evidence before the trial judge who at such hearing was the sole judge of the weight of the testimony and credibility of the witnesses. He may choose to believe or disbelieve all or any part of any witness' testimony. *Holloway v. State*, 691 S.W.2d 608, 614 (Tex.Cr.App.1984); *Hawkins v. State*, 660 S.W.2d 65, 72 (Tex.Cr.App.1983); *Waller v. State*, 648 S.W.2d 308, 311 (Tex.Cr.App.1983); *Myre v. State*, 545 S.W.2d 820, 824 (Tex.Cr.App.1977); *Aranda v. State*, 506 S.W.2d 221 (Tex.Cr.App.1974).

The trial judge found the statements to have been voluntarily made and admissible in evidence obviously having concluded that the statements were after the effective date of Article 38.22, supra, as amended 1977. There is evidence to support the trial court's action in admitting Jackson's testimony. Appellant's point of error is overruled.

After Jackson testified before the jury appellant called several jail inmates as witnesses in an attempt to impeach Jackson and his denial of a "deal" with the State

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[3] Earlier on direct examination Jackson had used the dates September 2nd to September 5th.

for his testimony. That, of course, was a matter for the jury who were the trier of the facts, judge of the credibility of the witnesses and the weight to be given to their testimony.

Appellant has attached to his brief out of the court affidavits and exhibits to demonstrate Jackson's subsequent retraction of his testimony favors received from the District Attorney's office and that there was a "deal" with the State. None of this material is properly before the court in its present posture. *Pollan v. State*, 612 S.W.2d 594 (Tex.Cr.App.1981); *Garrett v. State*, 566 S.W.2d 605 (Tex.Cr.App.1978); *Rasberry v. State*, 535 S.W.2d 871 (Tex.Cr.App.1976); *Grant v. State*, 505 S.W.2d 259 (Tex.Cr.App.1974).

Appellant contends the court "erred in overruling and admitting evidence of extraneous offenses on the part of the appellant." Appellant calls attention to a particular motion in limine he filed to restrict the State from offering into evidence extraneous offenses. The motion was overruled. Appellant now complains that through the testimony of Robert Hoehn that certain homosexual acts on his part were improperly admitted as extraneous offenses. He calls attention to 22 places in Hoehn's trial testimony where such acts were described. To none of this testimony was there any trial objection addressed, and nothing is preserved for review. *Bouchillon v. State*, 540 S.W.2d 319 (Tex.Cr.App.1976).

> "Reliance on a motion in limine will not preserve error. A defendant must object on the proper grounds when the evidence is offered at trial. *Harrington v. State*, 547 S.W.2d 616 (Tex.Cr.App.1977); *Lopez v. State*, 535 S.W.2d 643

> (Tex.Cr.App.1976). The reason for this is that a judge is often not in a position to decide on the admissibility of evidence prior to the beginning of trial." *Romo v. State*, 577 S.W.2d 251, 252 (Tex.Cr.App.1979).

See also *Gonzales v. State*, 685 S.W.2d 47, 51 (Tex.Cr.App.1985), *Woolls v. State*, 665 S.W.2d 455, 470 (Tex.Cr.App.1983); *Armitage v. State*, 637 S.W.2d 936 (Tex.Cr.App.1982).

Appellant's point of error is overruled.

In another point of error appellant contends that the trial court erred in allowing the State to argue to the jury outside the record. He then lists nineteen separate instances under the one point of error. The record shows that in fifteen of the instances listed where the prosecutor referred to the appellant as "killer," "pervert", etc., there was no obligation at all. "Without a timely and specific objection being made, no error is preserved for our review." *Vela v. State*, 516 S.W.2d 176 (Tex.Cr.App.1974). We examine the four remaining instances where objections were made.

In the first the prosecutor stated, "That little pervert wanted to look through that window, he wanted to . . . " Appellant's counsel interrupted, "I object to him testifying." The prosecutor responded he was talking about the evidence in the record. The court then stated, "Counsel stay within the record, please." The prosecutor continued his argument. No further relief was requested by the appellant. To preserve error for review a defendant must pursue his objection until an adverse ruling is received. *Penry v. State*, 691 S.W.2d 636 (Tex.Cr.App.1985); *Stevens v.*

State, 671 S.W.2d 517, 521 (Tex.Cr.App.1984); *Lewis v. State*, 664 S.W.2d 345, 349 (Tex.Cr.App.1984); *Euziere v. State*, 648 S.W.2d 700, 703 (Tex.Cr.App.1983); *Stoner v. State*, 585 S.W.2d 750, 755 (Tex.Cr.App.1979). No error is presented for review.

In the second remaining instance the prosecutor referred to appellant's "demon cult friends." The court in effect sustained appellant's "out of the record" objection, instructed the jury to disregard the argument "outside the record" and admonished the prosecutor to stay inside the record. No further relief was requested. The next instance involved the prosecutor referring "to the freaks and perverts of the world." The court sustained appellant's objection and instructed the prosecutor to stay within the record. No further relief was requested. There was no pursuit of an adverse ruling. Nothing is presented for review. See *Stoner v. State*, supra; *Earnhart v. State*, 582 S.W.2d 444, 449 (Tex.Cr.App.1979); *Hanner v. State*, 572 S.W.2d 702, 707 (Tex.Cr.App.1978).

In the final remaining instance the prosecutor in discussing the evidence stated, "I wouldn't be surprised if he didn't eat those body parts." The court immediately sustained appellant's "speculation out of the record" objection and instructed the jury to "disregard the last remark of the prosecuting attorney." No motion for mistrial was made and no further relief was requested. Nevertheless, appellant contends the argument was designed to prejudice and inflame the minds of the jurors, and the instruction was not sufficient to cure the error. He cites *Simpson v. State*, 493 S.W.2d 793 (Tex.Cr.App.1973), and *Boyde v. State*, 513 S.W.2d 588 (Tex.Cr.App.1974). *Simpson* is distinguishable because the defendant pursued his

objection to an adverse ruling when the trial judge overruled his motion for mistrial. In the instant case there was no motion for mistrial, no pursuit of an adverse ruling. In *Boyde*, the prosecutor persistently disregarded the trial court's admonitions to stay within the record and attempted to circumvent rulings in both the presentation of evidence and argument to the jury. *Boyde* is thus distinguishable from the instant case on the facts. No error was preserved for review.

Appellant further contends he was denied a speedy trial under the federal and state constitutions.[4]

In *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), the United States Supreme Court established a balancing test for ascertaining whether the right to speedy trial has been denied, based on at least four criteria:

(1) the length of delay;

(2) the reason for delay;

(3) the accused's assertion of his right;

(4) the prejudice to the accused.

It has long been noted that none of these four criteria have "talismanic qualities," and that a showing of prejudice is not *sine qua non* to demonstrating a denial of the right of speedy trial. *Davison v. State*, 510 S.W.2d 316, 319 (Tex.Cr.App.1974). *See also Moore v. Arizona*, 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973). These factors are to be

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[4] Article 32A.02, V.A.C.C.P., is not applicable to cases pending on July 1, 1978 as the instant case. *Wade v. State*, 572 S.W.2d 533, 535 (Tex.Cr.App.1978).

considered together, and each case is to be judged on an *ad hoc* basis. *Barker*, at 530, 533; *see also United States v. Eight Thousand Eight Hundred and Fifty Dollars*, 461 U.S. 55, 103 S.Ct. 2005, 76 L.Ed.2d 143 (1983); *Phillips v. State*, 650 S.W.2d 396, 404 (Tex.Cr.App.1983).

According to *Barker v. Wingo*, supra, the length of delay serves in part as a "triggering" mechanism to determine if the right has been violated.

> "The delay that can be tolerated varies with the circumstances of each case. For example, a delay of nine months may be 'wholly unreasonable' under the circumstances. *Barker*, supra, 407 U.S. at 528, 92 S.Ct. at 2191. Conversely, delays of two years and seven months, *McCarty v. State*, 498 S.W.2d 212, 215 (Tex.Cr.App.1973) and three years and eight months, *Swisher v. State*, 544 S.W.2d 379, 381 (Tex.Cr.App.1976), cert. denied, 429 U.S. 1038, 97 S.Ct. 734, 50 L.Ed.2d 749 (1977), have been acceptable." *Flores v. State*, 625 S.W.2d 44, 46 (Tex.App. – San Antonio, 1981, no writ).

In the instant case there was a delay of less than eleven months from the date of arrest on August 5, 1977, and the date of trial on June 22, 1978. This delay does not *per se* show a denial of the right to speedy trial. *Davison*, supra.

Secondly, the reason for delay was exacerbated by no less than forty-four motions filed by appellant on January 9, 1978, evidencing that appellant was not ready for trial. There is no evidence that the prosecution or trial court deliberately delayed bringing the case to trial. Thirdly, there is no evidence beyond the two motions for speedy trial filed with the district clerk that appellant asserted

his right to a speedy trial by requesting hearings to present evidence on the matter. Finally, appellant has made no showing of prejudice or harm to him as a result of any delay. Although appellant's bail was denied, this was within the trial judge's discretion and no evidence is before us to show an abuse of that discretion. *See* Articles 1.07 and 16.15, V.A.C.C.P.

In two points of error, contained in a supplemental brief, appellant complains of the trial court's action in permitting Drs. James Grigson, a psychiatrist, and Dr. Gerald Landrum, a psychologist, to testify on the issue of further dangerousness, Article 37.071(b)(2), V.A.C.C.P., at the penalty stage of the trial. Appellant relies upon *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), a Texas case.

The Supreme Court, in *Estelle v. Smith*, supra, speaking through Chief Justice Burger, held that where prior to the in-custody psychiatric examination ordered by the court to determine the defendant's competency to stand trial the defendant had not been warned that he had the right to remain silent, and that any statement made could be used against him at the sentencing proceeding, admission at the penalty stage of a capital felony trial of a psychiatrist's damaging testimony on the crucial issue of future dangerousness violated the Fifth Amendment privilege against compelled self-incrimination because of a lack of appraisal of rights and a knowing waiver thereof, the death penalty imposed could not stand.

The Court further held that the Sixth Amendment's right to counsel was violated where defense counsel was not notified in advance that the psychiatric examination

would encompass the issue of future dangerousness and there was no affirmative waiver of the right to counsel.

It must be remembered that both the Fifth and Sixth Amendments are applicable to the states by virtue of the Fourteenth Amendment. See *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); *Pointer v. State*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

In *Estelle v. Smith*, supra, the Dallas County district judge, on his own motion, appointed Dr. James Grigson to examine the defendant on the issue of his competency to stand trial. See Article 46.02, V.A.C.C.P. Dr. Grigson examined the defendant without giving any warnings regarding his Fifth Amendment privilege against self-incrimination and did not notify the defense counsel that the psychiatric examination would encompass the issue of the defendant's future dangerousness, nor was the defendant accorded the assistance of counsel in determining whether to submit to such examination, etc.

After the examination, Dr. Grigson reported to the court that Smith (the defendant) was competent to stand trial. The case went to trial with no issue being raised as to the defendant's competency to stand trial or as to the defensive issue of insanity at the time of the alleged offense. After Smith was convicted at the guilt stage of the bifurcated trial of the capital murder, Dr. Grigson was called by the State at the penalty stage of the trial to testify that, based upon his examination, he considered

the defendant Smith a severe sociopath who would commit violent acts in the future "if given the opportunity to do so." The jury subsequently returned affirmative answers to the special issues submitted under article 37.071(b) V.A.C.C.P., and the trial court assessed the death penalty on appeal. The conviction was affirmed by this Court in *Smith v. State*, 540 S.W.2d 693 (Tex.Cr.App.1976).

Having exhausted his state remedies, Smith sought federal habeas corpus relief and prevailed on the contentions identical to those raised at trial by this appellant in the instant cause. *Smith v. Estelle*, 445 F.Supp. 647 (N.D.Texas 1977). The Court of Appeals for the Fifth Circuit affirmed though modifying the decision. *Smith v. Estelle*, 602 F.2d 294 (5th Cir.1979). Subsequently the United States Supreme Court affirmed the Fifth Circuit opinion as earlier noted.

In affirming the lower court in the said *Smith* case, the Supreme Court noted that Smith's future dangerousness was a critical issue at the penalty stage of the capital murder trial, and one upon which the State had the burden of proof beyond a reasonable doubt [See Article 37.071(b) and (c), V.A.C.C.P.]; that the State, to meet its burden used Smith's own statements unwittingly made without an awareness that he was assisting the State's efforts to obtain the death penalty.[5]

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[5] The statements were made to the psychiatrist in what was supposedly a pretrial examination to determine competency to stand trial.

Thus, the United States Supreme Court held that both the Fifth and Sixth Amendments of the United States Constitution are violated by a doctor's testimony on future dangerousness at the penalty stage of the trial when the opinion is based on questioning of a defendant in custody who is represented by counsel and the questioning is conducted without prior warning on the Fifth Amendment privilege and without opportunity for advice of counsel.[6]

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[6] In *Smith* the Supreme Court wrote:

> "In *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966), the Court acknowledged that 'the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.' *Miranda* held that 'the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.' *Id.*, at 444, 86 S.Ct., at 1612. Thus, absent other fully effective procedures, a person in custody must receive certain warnings before any official interrogation, including that he has a 'right to remain silent' and that 'anything said can and will be used against the individual in court.' *Id.*, at 467-469, 86 S.Ct., at 1624-1625. The purpose of these admonitions is to combat what the Court saw as 'inherently compelling pressures' at work on the person and to provide him with an awareness of the Fifth Amendment privilege and the consequences of foregoing it, which is the prerequisite for 'an intelligent decision as to its exercise.' *Ibid.*

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In the instant case the facts surrounding the examination by Dr. Grigson were not well developed. Appellant's

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"The considerations calling for the accused to be warned prior to custodial interrogation apply with no less force to the pretrial psychiatric examination at issue here. Respondent was in custody at the Dallas County Jail when the examination was ordered and when it was conducted. That respondent was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial. When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a post-arrest custodial setting. During the psychiatric evaluation, respondent assuredly was 'faced with a phase of adversary system' and was 'not in the presence of [a] person[ ] acting solely in his interest.'" *Id.*, at 469, 86 S.Ct. at 1625. Yet he was given no indication that the compulsory examination would be used to gather evidence necessary to decide whether, if convicted, he should be sentenced to death. He was not informed that, accordingly, he had a constitutional right not to answer the questions put to him.

"The Fifth Amendment privilege is 'as broad as the mischief against which it seeks to guard,' *Counselman v. Hitchcock*, 142 U.S. 547, 562, 12 S.Ct. 195, 198, 35 L.Ed. 1110 (1892), and the privilege is fulfilled only when a criminal defendant is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.' *Malloy v. Hogan*, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493-1494, 12

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counsel asserted in colloquy that appellant was taken out of the Smith County jail at the order of the district

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L.Ed.2d 653 (1964). We agree with the Court of Appeals that respondent's Fifth Amendment rights were violated by the admission of Dr. Grigson's testimony at the penalty phase."

"A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. Because respondent did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to Dr. Grigson to establish his future dangerousness. If, upon being adequately warned, respondent had indicated that he would not answer Dr. Grigson's questions, the validly ordered competency examination nevertheless could have proceeded upon the condition that the results would be applied solely for that purpose. In such circumstances, the proper conduct and use of competency and sanity examinations are not frustrated, but the State must make its case on future dangerousness in some other way.

" 'Volunteered statements . . . are not barred by the Fifth Amendment,' but under *Miranda v. Arizona*, supra, we must conclude that, when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements of Dr. Grigson were not 'given freely and voluntarily without any compelling influences' and, as such, could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them. *Id.*, [384 U.S.] at 478, 86 S.Ct., at 1630.

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attorney and taken to Dallas for an examination by Dr. Grigson without notice to counsel and without court

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> These safeguards of the Fifth Amendment privilege were not afforded respondent and, thus, his death sentence cannot stand." (Footnotes omitted.)

In discussing the Sixth Amendment contention, the Supreme Court in *Smith* wrote:

> "When respondent was examined by Dr. Grigson, he already had been indicated (sic) and an attorney had been appointed to represent him. The Court of Appeals concluded that he had a Sixth Amendment right to the assistance of counsel before submitted to the pretrial psychiatric interview. 602 F.2d, at 708-709. We agree.
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> "The Sixth Amendment, made applicable to the states through the Fourteenth Amendment, provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.' The 'vital' need for a lawyer's advice and aid during the pretrial phase was recognized by the Court nearly 50 years ago in *Powell v. Alabama*, 287 U.S. 45, 57, 71, 53 S.Ct. 55, 60, 65, 77 L.Ed. 158 (1932). Since then, we have held that the right to counsel granted by the Sixth Amendment means that a person is entitled to the help of a lawyer 'at or after the time that adversary judicial proceedings have been initiated against him- . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' *Kirby v. Illinois*, 406 U.S. 682, 688-689, 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411 (1972) (plurality opinion); *Moore v. Illinois*, 434 U.S. 220, 226-229, 98 S.Ct. 458, 463-465, 54 L.Ed.2d 424 (1977). And in *United States v. Wade*, 388 U.S. 218, 226-227, 87 S.Ct. 1926, 1932, 18 L.Ed.2d 1149 (1967), the Court explained:
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> " 'It is central to the [Sixth Amendment] principle that in addition to counsel's presence at trial, the

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order. Dr. Grigson did testify he examined the appellant in the hospital division of the Dallas County jail, that he

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accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.' (Footnote omitted.)

See *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980); *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). See also *White v. Maryland*, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963); *Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961).

"Here, respondent's Sixth Amendment right to counsel clearly had attached when Dr. Grigson examined him at the Dallas County Jail, and their interview proved to be a 'critical stage' of the aggregate proceedings against respondent. See *Coleman v. Alabama*, 399 U.S. 1, 7-10, 90 S.Ct. 1999, 2002-2004, 26 L.Ed.2d 387 (1970) (plurality opinion); *Powell v. Alabama*, *supra*, 287 U.S., at 57, 53 S.Ct. at 60. Defense counsel, however, were not notified in advance that the psychiatric examination would encompass the issue of their client's future dangerousness, and respondent was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed.

"Because '[a] layman may not be aware of the precise scope, the nuances, and the boundaries of his Fifth Amendment privilege,' the assertion of that right 'often depends upon legal advise from someone who is trained and skilled in the subject matter.' *Maness v. Meyers*, 419 U.S. 449, 466, 95 S.Ct. 584, 595, 42 L.Ed.2d 574 (1975). As the Court of Appeals observed, the decision to be made regarding the

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knew of no court order, and had or would bill the District Attorney of Smith County for his services. There was no showing that *Miranda* warnings were given to the appellant or that Dr. Grigson informed him that the examination was for the purpose of determining his further dangerousness.

Before Dr. Grigson testified appellant objected on the ground that his "right to counsel" had been violated and he had been deprived of the effective assistance of counsel. The objection was overruled.

Dr. Grigson testified he made a complete psychiatric examination in an hour and a half and found appellant to have an antisocial personality disorder, which is not an illness or sickness, that appellant was a severe sociopath.

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proposed psychiatric evaluation is 'literally a life or death matter' and is 'difficult . . . even for an attorney' because it requires 'a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, [and] of possible alternative strategies at the sentencing hearing.' 602 F.2d, at 708. It follows logically from our precedents that a defendant should not be forced to resolve such an important issue without 'the guiding hand of counsel.' *Powell v. Alabama, supra,* 287 U.S., at 69, 53 S.Ct., at 64.

"Therefore, in addition to Fifth Amendment considerations, the death penalty was improperly imposed on respondent because the psychiatric examination on which Dr. Grigson testified at the penalty phase proceeded in violation of respondent's Sixth Amendment right to the assistance of counsel." (Footnotes omitted.)

He expressed the opinion that "from a medical psychiatric standpoint probability" appellant will "continue to behave and act in a way that does represent a very serious threat to the people within our society."

While the exact time of the examination is not clear from the record, it appears that it took place after appellant had been formally charged or indicted. Thus his right to assistance of counsel had attached. *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). While the attachment of that right does not encompass the right to have counsel actually present during the examination, *Estelle v. Smith*, supra, does mean that appellant's counsel should have been informed that the examination would encompass the issue of future dangerousness. Additionally, the attachment of the right to counsel meant that appellant could have consulted with his attorney prior to the examination by Dr. Grigson. There is nothing to indicate that appellant gave a knowing, intelligent, and voluntary waiver of his right to counsel, and a waiver will not be presumed from a silent record.

Thus there would appear to be violations of both appellant's Fifth and Sixth Amendment rights at the penalty stage of the instant capital murder trial by the admission of Dr. Grigson's testimony.

If it could be argued that appellant's objections were not sufficient, it is observed that he did object to Dr. Grigson's testimony on the "right to counsel" basis preserving his Sixth Amendment error. As to the Fifth Amendment error, attention is called to footnote 19 of *Smith v. Estelle*, 602 F.2d 694, 702 (5th Cir.1979), where it was held that failure to object was excused since "Texas

courts" had interpreted Fifth and Sixth Amendments to permit such testimony like Dr. Grigson's [in *Smith*] and there was an apparent futility in objecting to an alleged constitutional violation. In footnote 12 of *Estelle v. Smith*, supra, the Supreme Court adopted the reasoning of the Fifth Circuit as to the claimed Fifth Amendment violation.

Further, the 1981 opinion in *Estelle v. Smith* supra, has been held to be retroactive. *Battie v. Estelle*, 655 F.2d 692 (5th Cir.1981); *White v. Estelle*, 720 F.2d 415 (5th Cir.1983); *Muniz v. Procunier*, 760 F.2d 588 (5th Cir.1985), cert. denied, *McCotter v. Muniz*, 474 U.S. 934, 106 S.Ct. 267, 88 L.Ed.2d 274 (1985); *Jones v. McCotter*, 767 F.2d 101 (5th Cir.1985). And this Court has applied the decision retroactively as to both Fifth and Sixth Amendment violations. See, e.g., *Thompson v. State*, 621 S.W.2d 624 (Tex.Cr.App.1981); *Fields v. State*, 627 S.W.2d 714 (Tex.Cr.App.1982); *Ex parte Demouchette*, 633 S.W.2d 879 (Tex.Cr.App.1982); *Ex parte English*, 642 S.W.2d 482 (Tex.Cr.App.1982); *Ex parte Chambers*, 688 S.W.2d 483 (Tex.Cr.App.1984).

And it has been said, "[W]here a defect of constitutional magnitude has not been established at the time of the trial, the failure of counsel to object does not constitute waiver." *Ex parte Chambers*, 688 S.W.2d, supra at 486 (Campbell, J., concurring); *Cuevas v. State*, 641 S.W.2d 558, 563 (Tex.Cr.App.1982); *Ex parte Sanders*, 588 S.W.2d 383 (Tex.Cr.App.1979), and cases there cited.

Appellant did not waive his claimed violations by offering psychiatric evidence either at the guilt of penalty

stage. See *Estelle v. Smith,* supra, 101 S.Ct. at 1878. See also *Battie v. Estelle,* supra, 655 F.2d at 702.

Before turning to the question of whether the error in admitting Dr. Grigson's testimony could be harmless, the testimony of Dr. Jerry Landrum must be noted. Appellant complains of Dr. Landrum's testimony on the same basis as Dr. Grigson's.

It is observed that there was no trial objection to Dr. Landrum's testimony on the basis now urged on appeal. Here, as with Dr. Grigson's testimony, the facts surrounding the examination, etc., are meager. Dr. Landrum, a clinical psychologist, testified that he worked full time at the Rusk State Hospital from 1969 through 1976. Without dates being established, Dr. Landrum testified he had examined the appellant, and gave testimony much the same as Dr. Grigson, and he expressed the opinion that "it is likely that he will be a continuing threat to society" and "would have a high probability of acting out in an aggressive and harmful manner." Dr. Landrum testified that at the time of his examinations there had been multiple drug abuse by appellant including extensive use of marihuana, [sic] acid, speed, downers and alcohol. He observed that appellant had a sexual deviation, pansexuality, which manifested itself in violence and aggression against humans. The doctor expressed the opinion there was no chance of rehabilitation for the appellant. On cross-examination it was established that the doctor had observed the appellant "throughout this time" and his last examination of the appellant was at Rusk State Hospital about or "within the last three years" of his June

1978 trial testimony. It is clear that Dr. Landrum examined appellant prior to the alleged offense, the indictment, the appointment of counsel, etc., and was not in connection with testifying as to the issue of future dangerousness. *Estelle v. Smith,* supra, is not applicable to Dr. Landrum's testimony. The testimony was properly admitted.

Turning to the question of harmless error, we observe that in *Satterwhite v. State,* 726 S.W.2d 81 (Tex.Cr.App.1986), there was no question that Dr. Grigson's testimony on future dangerousness at the penalty stage of Satterwhite's trial was tainted by Sixth Amendment error. However, the same testimony, not shown to be tainted, elicited from a psychologist, as in the instant case, and there was evidence of four prior felony convictions, other unadjudicated extraneous offenses involving a shooting, etc., the testimony from eight (8) peace officers that the defendant's reputation for being a peaceful and law-abiding citizen was "bad" as well as the testimony from the guilt stage of the trial which was before the jury. See *Bravo v. State,* 627 S.W.2d 152 (Tex.Cr.App.1983; *O'Bryan v. State,* 591 S.W.2d 464 (Tex.Cr.App.1979).

In *Satterwhite,* this Court wrote:

> "We conclude that the properly admitted evidence was such that the minds of an average jury would have found the State's case sufficient on the issue of the 'probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society' even if Dr. Grigson's testimony had not been admitted. The admission of the testimony

was harmless error beyond a reasonable doubt. *Sanne v. State*, 609 S.W.2d 762 (Tex.Cr. App.1980)."

In the instant case the tainted testimony from Dr. Grigson was also in evidence from an untainted source, Dr. Landrum. And at the penalty stage there was also testimony from 13 witnesses who testified that appellant's reputation for being a peaceable and law-abiding citizen was bad. Texas Ranger Bob Prince had known appellant about three and a half years. Pete Menefee, the District Attorney for Cherokee, had known appellant "a couple of years." Danny Stallings, Sheriff of Cherokee County, had known appellant and his family all his life, and known appellant "personally" for "a couple of years." Archie Cook, Chief of Police of Jacksonville, had known the appellant for seven years. Sgt. Robert Jackson of the Jackson Police Department had known the appellant eight or nine years. John Wigman, Constable of Precinct No. 6 or Cherokee County, had known appellant about six years.

E.G. Osburne, Principal at the Jacksonville High School, had known appellant since 1972. Ray Darvey, Vice Principal at the Jacksonville High School, had known appellant for some six years since he became a student at the high school. Homer Kennedy, owner of the Kennedy Chevrolet-Pontiac Company in Troup, had known appellant for about four years. Howard Chastine, an employee at the same automobile company in Troup had also known appellant for about four years. Connie Stovall, owner of an Exxon service station in Jacksonville, had known appellant for five years. H.C. Plunk, car salesman at Livezey Chevrolet Company in Jackson, had known

appellant for four years. Bob Bailey, a wholesale gasoline dealer, had known appellant over three years. In addition there was record evidence of appellant's 1973 felony theft conviction in the Second District Court.

It is true, of course, that in answering the special issues under Article 37.071, V.A.C.C.P., including the issue of future dangerousness, the jury may consider all of the admitted evidence at the first or guilt stage of the bifurcated trial. *Garcia v. State*, 626 S.W.2d 46 (Tex.Cr.App.1981), and cases there cited; *Russell v. State*, 598 S.W.2d 238, 254 (Tex.Cr.App.1980); *Russell v. State*, 665 S.W.2d 771, 781 (Tex.Cr.App.1983). It has been said that the circumstances of the offense and the facts surrounding it may furnish greater probative evidence than any other evidence regarding the second special issue (future dangerousness) submitted at the penalty stage of a capital murder trial. *Duffy v. State*, 567 S.W.2d 197 (Tex.Cr.App.1978). See also *Carter v. State*, 717 S.W.2d 60 (Tex.Cr.App.1986); *Fierro v. State*, 706 S.W.2d 310, 319 (Tex.Cr.App.1986); *Bush v. State*, 697 S.W.2d 397, 399 (Tex.Cr.App.1985).

The facts, already described, show a brutal vicious murder in which the victim was mutilated and her vagina cut from her body.

As in *Satterwhite*, we conclude that, even if Dr. Grigson's testimony had not been admitted, the properly admitted evidence was such that the minds of an average jury would have found the State's case sufficient on the issue of future dangerousness. The admission of Dr.

Grigson's testimony was harmless beyond a reasonable doubt.

The judgment is affirmed.

CLINTON, Judge, dissenting.

The offense was committed during early morning hours of June 10, 1977, and the record reflects that the case gained instant notoriety. No doubt and commendably, members of the law enforcement community, including the district attorney, were anxious to solve the crime, and are convinced they succeeded. But to me, at least, there are some troublesome aspects in this cause.[1]

The record reflects that not until August 4, 1977 did officers believe there was probable cause to arrest appellant. Just the day before, according to the complaint or information made by Detective Eddie Clark, Sgt. Doug Collard had concluded that latent fingerprints he lifted from outer patio door frame were left by appellant; though Detective Clark related that he had interviewed Paula Rudolph on June 10, 1977, and summarized what she reported about seeing a man and hearing him leave,

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[1] At the outset it must be noted that the State introduced 109 exhibits, some 70 of them being slide photographs of every pertinent detail of the crime scene, as well as a blueprint of the apartment complex and grounds and a diagram of the floor plan of apartment no. 169; appellant offered ten exhibits. None was reproduced in the record forwarded to this Court, so we were at once disadvantaged in relating constant testimony that "this is there (indicating)" to the exhibits. To correct those deficiencies in the record we ordered up the exhibits and they have now been examined. Appended hereto is State's Exhibit 101, a floorplan of her apartment Paula Rudolph shared with deceased.

nowhere does he indicate that she could identify him. Detective Clark obtained a warrant to arrest appellant, and it was executed the next day. Within thirty days Edward Scott Jackson and appellant were in the same tank. Immunity was granted several persons. An indictment was returned September 19, 1977. Transactional immunity was granted to James B. Taylor, uncle of appellant. A "reindictment" was presented November 7, 1977. Trial commenced June 5, 1978. Appellant had recently turned twentytwo [sic].

The evidence may be sufficient when one picks and chooses certain items, but a rational reviewer of all facts is left with serious questions whether a rational trier of fact could find guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Paula Rudolph opened an unlocked front door after midnight; from entry area to her left she saw door to bedroom of deceased was open and silhouetted in very bright light overhead was a human figure; it turned ("for one split second there we were face to face"), whirled out of sight and closed the bedroom door. The figure was wearing what appeared to be "white shorts," "a definite band of white across the lower torso into the top of the leg." However, Robert Hoehn testified appellant never wore white around him, and left his car wearing long dark blue pants, but under them were sport shorts with a "*blue* body and a *red* stripe around the waist and down the leg."[2]

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[2] All emphasis is mine throughout unless otherwise noted.

In her own bedroom, Rudolph heard sliding patio door to the rear of the apartment open and close, assuming the figure was *leaving*. Lt. Doug Collard said fingerprints on the door were made when appellant *entered* and closed the patio door behind him; if done contemporaneously surely it made same sliding noise Rudolph heard, alerting fully clothed deceased. But he also testified that when first attacked deceased was lying on a "bed" (actually a couch, see *post*, n. 8.), there was no evidence of a struggle nor any indication that deceased offered resistance against her attacker. Usually detectives take that to mean a victim knows her assailant.

The most *prejudicial* evidence in reels and reams was given by Hoehn. Not mentioned in the opinion of the Court is the fact that to obtain his testimony the State granted Hoehn immunity.

The most *incriminating* testimony came from Edward Scott Jackson, and a clear inference from arrangements made to place appellant in the same tank with Jackson and the latter's taking the initiative with appellant is that he had a personal stake in the matter. His memory about the conversation was much better than his recollection of the more important point of law, that is, when did the conversation take place. On that score, jail records that may have helped refresh his recollection or cast light on the subject "were either missing or had not been kept for that period."[3]

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[3] While not properly before the Court, as the majority opinion notes, there is material extant revealing that Jackson recanted his testimony, was at the time the beneficiary of favors bestowed by the district attorney and did indeed have a "deal" with the State. See *post*, at p. 954.

Manifestly, then, there are certain matters of critical importance, and to evaluate them intelligently one must identify the principals and place them in a setting of time and place as of June 9, 1977.

Paula Rudolph is a thirtysix year old widow. She has resided in Apartment No. 169 for almost two years, and works as a Tech Processing Librarian at Texas Eastern University. Her supervisor is James Mayfield, Dean of the Learning Resource Center; in his early forties and married, he and his wife have three children. Linda Jo Edwards is twentyone, a secretary in the English Department, School of Humanities, who earlier had worked under the supervision of Rudolph and, in turn, Dean Mayfield.

Edwards "had a lot of life to her and she had a lot of intelligence, but she didn't have a lot of experience . . . and was impressed with the attention of someone like she had never known before," namely Dean Mayfield, according to Rudolph. They have been emotionally involved for some eighteen months, and are having an affair. Formerly living in the Bullard area of Tyler and once married but divorced, at one point in time for "probably a couple of months, a few months," Edwards stayed with the Mayfields in their home. Mayfield visited Rudolph in her apartment "a few times" and she saw him around the complex another time. Rudolph elaborated:

> "They were – he was in the parking lot close to the tennis courts coming away from the tennis courts."

For about two weeks Edwards has been a guest of Rudolph, looking for her own apartment; Dean Mayfield has been in once during that period.

Rudolph arrived home on the evening of June 9 about 8:30 p.m. to find the front door locked and no one there; while she was eating, Edwards came in around 9:30 and they chatted until Rudolph said she was going to take a shower; Edwards said she would go over to the tennis courts "to see if there was anyone there to play with." Returning at approximately 10:15, Edwards related that she "had run into some old friends," a couple, and a second man with the couple. She gave Rudolph an impression that the three of them lived in the apartments and that she was going back to play tennis with them because they were to give her some pointers. Rudolph left at 10:30. In a few minutes Hoehn would arrive at Taylor's apartment with beer for appellant.

Eyewitness Identification

The next day Rudolph was interviewed by a police lieutenant and gave a sworn statement which was tendered jointly by the parties on *crossexamination* and read into evidence by Rudolph, herself. Therein she recounted the information summarized above and the following account of activity and observations after she returned about 12:35 to 12:45 a.m., and opened unlocked front door to her apartment (which she did not then or later lock and Lt. Collard would say had no indication of forcible entry) – practically at same time Hoehn testified he let appellant out entrance to a parking lot in front of

the complex and declined an invitation to come in with appellant.

" . . . I pushed the door open and stepped in and noticed a figure jump behind the door in Linda's room. I remember the figure had silver hair cut in a medium touching the ears fashion that men wear. The body was that of a Caucasian with a tan wearing white shorts of some fashion. I do not know if they were briefs, walking shorts, tennis shorts, or exactly what style. The figure was sleek and slender and he moved quickly behind the door in Linda's room and closed it. I knew that Linda had been seeing my boss, Jim Mayfield.

My first impression on seeing the figure was that it was he, even though I could not see the facial features nor hear him speak. I felt that the best thing for me to do was to go to my room and exercise discretion. I called out, 'Don't worry, it's only me.' I went straight to my room. After getting through my room in just a few moments, less than five minutes, I'm sure, I heard the patio doors open and close. I decided to go into the kitchen and get me a cup of coffee and unplug the pot but decided not to since Linda might be in the living room or on the patio with the person I assumed to be Jim Mayfield.

I got into bed at approximately 12:45. I got back up a few minutes later to set the alarm and it was 12:50. I then went back to bed. I did not hear Linda or anyone else speak during the time I arrived home until I went to sleep. I did hear the television in Linda's room or it might have been the radio.

I woke up at 6:30 A.M. this morning but did not get up until 7:00 A.M. * * * "[4]

Faced with that statement, the prosecution and Rudolph fashioned her direct testimony to elaborate on those moves and observations in such manner as to demonstrate her impression that the figure is Dean Mayfield was erroneous.[5]

Rudolph explained from her position in entry foyer to center of bedroom she had "approximately one foot field of vision;" she moved in a dark area looking into an

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[4] Soon she went to the kitchen to make coffee; returning to her bedroom, she looked out through patio door and noticed wooden gate in rear patio fence was open – an "extremely unusual" event, since she insisted it be kept closed – and also immediately noticed her cat was not in the apartment as she usually is. Looking for her cat she pushed unclosed door to Edwards bedroom and saw her bloody arm. Shortly after Rudolph called police the cat scratched the patio door to be let in. The door was not locked.

[5] The fact of the matter is she had described Mayfield "from the shoulders up" almost perfectly. As she would later testify in response to several questions:

> "From the shoulders up he is a very slender man, sharped face and wears glasses. He has very thin silver hair, gray hair. I don't know the color of his eyes. * * * [In June 1987 his style of haircut] was a modern haircut, straight,. . . . about even around the ears. It's not short conservatively, it's semi-mod conservative, conservative mod."

Hoehn testified appellant wore his hair over his ears and down to his shoulders. When Dr. Grigson first saw him appellant "had long black hair."

intensely bright lighted area from high wattage bulbs in an overhead fixture; she described the torso of the figure. Then after answering affirmatively whether "this person who you saw in [Edwards'] bedroom [is present in the courtroom]" and being asked to do so, she pointed to appellant, described what he was wearing and where he was seated. Then the following occurred:

> "Q. Do you base your identification of this Defendant as the person who you saw in your roommate's [sic] bedroom, do you base this on what you recall from seeing late in the night of June 9th or early morning on June 10, 1977?
>
> A. Yes. I do. *He fits.*
>
> [DEFENSE COUNSEL]: Your Honor, I object to the non-responsive part on the witness and ask the Court to instruct her not to do so anymore.
>
> THE COURT: The Court will sustain the objection. The Jury is instructed to disregard that portion of the witness' which was 'he fits." [sic] The witness will please be as responsive to the question asked of you. . . .
>
> Q. Miss Rudolph, there was a non-responsive answer to the extent that you said 'he fits'. Do you mean that he fits the description of the physical characteristics which you recall from the night, is that what you mean?
>
> A. Yes. That is what I mean."

Her sworn statement ended with a recitation that she had read it, it is true and correct and that she "will testify to such facts in Court if asked to do so." After she finished reading it to the jury, the first question was

whether her "mind has changed" about the figure having "silver hair," and she allowed it had. In response to further questions, she stated that appellant's hair was "very black," "not speckled with gray" and "not silver", that his was a "broad face," Mayfield's "probably sharper than his," and that by "broad face" she meant "the shape of it," because: *"I did not and never said I saw the figure distinctly enough to see features."*

Counsel for appellant then returned to her partially nonresponsive answer that "he fits," and what she agreed with the prosecutor she meant by that. To his questions she responded that she had talked about her description of the figure with relatives, numerous police officers and prosecuting attorneys; she agreed that she had not spoken with defense counsel. Counsel drew her attention to an August 19 examining trial and September 20 bail hearing at which she testified, knowing that appellant was there as accused. Regarding prior testimony given by her then to the effect that "this person had white hair, silver hair or whatever," she said that had been her testimony, adding that "this person refers back to the person I thought I recognized," namely, Jim Mayfield. As to "what has changed [her] mind" since then, Rudolph offered an explanation, *viz*:

> "For one think I think when I made the statement . . . , it was within a few hours of discovering Linda's body. If I were doing it logically when I was not in such a state of shock and I were writing it and not dictating it, I think I would have worded it differently. *I do not and am not certain that I saw the person's hair.* It was in extremely bright lighting looking at a silhouette.

> It was a very reflective. It was a reflection really."

Whether it was a matter of "thinking about it for a year," she thought not: "It is *attempting to be logical.*"

Asked if her testimony now is "that you didn't see someone with white hair," Rudolph answered that "my testimony and it's all along that it refers to the person I thought I recognize." She only "perceived that there was a reflection around his head that was silver;" she was not telling the jury that "because the room is well lighted [she] thought [she] saw someone with silver, yet now [she] is telling the jury that someone [had] black hair . . . . " What she is saying is "that I could very well have been mistaken in my original interpretation of my perception." Her recall is no better; it is a matter of "being able to stand back and take a logical look at something rather than reacting emotionally, based on completely preconceived ideas would enable one to make a better interpretation of a perception or almost anything for that matter." Her "identification" on direct examination "is the result of attempting to stand back, recall that figure that I saw, and recall it without preconceived notions that it was someone else."

Rudolph agreed that she may have been asked whether she recognized appellant and that she had never identified appellant in twice testifying under oath and once giving a sworn statement, but she denied that "now over a year later been [she has been] able to conjure up something that would identify him;" she had never been asked by counsel before. Subsequently, responding to questions, she reiterated:

> "I have attempted and I said I try to look at this objectively and logically to forget, to keep that image of that figure, that silhouette, in my mind and apply it without – without period. It was a silhouette, I was looking into that bright light. It was a shape, a shape as is probably the most difficult thing to describe. I have attempted and as I said before to apply that shape to see if it fits, forget anything I might have known previously or since.
>
> The shape, it fits.
>
> The outline, the shape, the silhouette against the light. There were shadows. I wasn't specifically aware of the exact shape of his nose or the exact shape of his eye or the color of his eye. I was aware of shadows and planes on a shape, a figure.
>
> I have never said anything else. He fits."

Rudolph concluded with "I believe that is the man I saw," as opposed to "what I thought I saw" at the time.

While rules permitting witnesses to testify on matters of identity are said to be liberal, the Court has recognized "there are certain limitations beyond which it is not safe to go." *Emery v. State*, 95 Tex.Cr.R. 336, 254 S.W. 957 (1923). However, there is a dearth of authority drawing clear lines of limitation.

On admissibility of evidence, the Court has upheld refusal of a trial court to admit proffered testimony that while the witness did not recognize accused at time and occasion in question, from a process of reasoning or believing based on subsequent information he concluded that it was accused he had seen. *Clark v. State*, 79

Tex.Cr.R. 196, 183 S.W. 437 (1916); cf. *Polk v. State*, 500 S.W.2d 825, 826 (Tex.Cr.App.1973). The Court has rejected tendered "misidentification" testimony when it is "speculative." *Turner v. State*, 600 S.W.2d 927, 933 (Tex.Cr.App.1980) (other males in vicinity of crime scene physically resembled accused and drove similar automobile); *Hall v. State*, 153 Tex.Cr.R. 215, 219 S.W.2d 475, 479 (1949) (while witness testified man in khaki clothes beat victim, because common knowledge that many men wear khaki clothing testimony that a certain man other than accused worked in khaki clothing nearby "too speculative").

In *Proctor v. State*, 465 S.W.2d 759 (Tex.Cr.App.1971), a Constable Coleman observed two men inside a store around 3:00 a.m., and as he sought to apprehend them one burglar came face to face with him and in an exchange of gunfire the Constable was struck by a volley of shots. Although he had known Proctor for years, Coleman was unable to identify him then. ("It didn't register on my mind that that was J.B. Proctor. Just no more than I got to see him.") Coleman became the sole witness placing accused at scene of the burglary.

During a hearing on motion to suppress his incourt identification of Proctor, the witness testified:

> "Q. I think you described it to me that you came to the conclusion, or became convinced, as to the identity of Proctor as being the man out there when a chain of pieces or circumstances that fell into place, that you were able finally to conclude in your mind that this was Proctor?
>
> A. Yes, sir.

Q. Of course, all of this that you've described, you jostled your memory to where you were able to positively say that was Proctor?

A. I say I exercised my channels of thought, and stronger and stronger with the days that went by I was more sure of it. I had satisfied myself that it was.

Q. Of course, without all of this investigation, you might never have satisfied your mind that way.

A. No, I don't think I would have."

The Court was "unable to conclude that there was clear and convincing proof that the in-court identification was of independent origin." *Id.*, at 765. In the hospital Coleman gave a description that did not fit Proctor. True it is that "this investigation" had been conducted by the Constable himself, beginning about three weeks after the offense occurred. Learning that an informer in Arkansas had described Proctor and named him as a participant in a shootout with an officer in Texas or Louisiana, Coleman obtained a mug shot of the man mentioned by the informer and set out on his own to find him. Instead, the confederate was arrested in Arkansas and upon being returned to Texas Coleman interrogated him without success; later, however, while Coleman was present he made a confession implicating Proctor in the affair. Coleman also obtained a letter alluding to the shooting. When Proctor was arrested and returned to the venue Coleman went to jail several times and once viewed him in direct confrontation in a maximum security cell. On the day Proctor was arraigned Coleman rode down an elevator

with him and was in the courtroom when he was served with indictment.

Paula Rudolph is not a peace officer, of course, but like Constable Coleman her split second confrontation with the person under the circumstances was such that she saw only a "figure," an "outline," a "shape" or a "silhouette." Her every action and words demonstrate that in her mind she then immediately thought and believed the person to be Dean James Mayfield. Obviously at some later day, though this record fails to reveal when or how, she was given to understand her assumption was incorrect. At that point she is in about the same attitude as Constable Coleman, both being unable to identify a person they "saw."

When appellant was arrested in early August Rudolph heard about it. She talked about her description of the figure with numerous police officers and the prosecuting attorneys. As a witness at the August 19 examining trial she saw appellant seated at counsel table between his lawyers and knew he was accused; she also testified at a September 20 hearing on motion for bail; again appellant was present. Finally, almost a year after the fact, like Constable Coleman, through mental processes she described Rudolph "satisfied [her]self" that appellant "fits" the "figure," "outline," "shape" or "silhouette."

> "The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: 'What is the worth of identification testimony even when uncontradicted? The identification of strangers is

> proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances of English and American trials. These instances are recent – not due to the brutalities of ancient criminal procedure.' The Case of Sacco and Vanzetti 30 (1927)."

United States v. Wade, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933, 18 L.Ed.2d 1149 (1967). Sobel, *Eyewitness Identification* (Second Edition), Clark Boardman Co., Ltd. (1986), Ch. 6; Sanders, *Helping the Jury Evaluate Eyewitness Testimony: The Need for Additional Safeguards*, 12 Am.J.Crim.L. 189, 190-191 (1984).

Mistaken identification on the part of an eyewitness may be the result of various factors operating on his unconscious mind. Because they are unknown to the average layperson, "[t]hese subtle but powerful influences . . . create the greatest danger of misidentification and wrongful conviction." *Sanders*, op cit., supra, at 192-193. Experts have divided the human memory process into three stages, towit: acquisition, retention (storage) and retrieval. There are distortions in each stage to such an extent that "eyewitness identifications, even those made under optimal conditions, are highly suspect." *Id.*, at 193.[6]

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[6] ". . . . In order to cope with this inherent limitation [in perceiving and encoding stimuli], the observer unconsciously concentrates selectively on the details that are more important to him. This problem of selective perception is exacerbated when a witness is called upon to remember details that were unimportant to him at the acquisition stage but later assumed greater significance. * * *

(Continued on following page)

Once an initial description, along with identification of a known person by name, is recanted by an "eyewitness," much more untrustworthy and hazardous is subsequent identification of a stranger in terms of "figure," "outline," "shape" or "silhouette." Recent experiences in *Ex parte Binder*, 660 S.W.2d 103 (Tex.Cr.App.1983) (five eyewitness [sic] making identification, some for first time at trial) and *State of Texas v. Geter* (five eyewitnesses identifying him), dictates an exercise in caution before routinely deferring to verdict of a jury.

Fingerprint Identification

When Paula Rudolph left her apartment at 10:30 p.m. her impression was that Linda Jo Edwards was going to play tennis with the couple and another man she had met by chance earlier that evening. The record does not show when she left or when she returned, and various

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(Continued from previous page)

Human memory is an active process by which fragments of information are integrated; gaps in the information are filled 'by inference, and incongruous details are changed so that they 'all make sense.' * * *

. . . . Witnesses, like other people, are highly motivated by a desire to conform. * * *

The danger of misidentification is again magnified by the desire to please authority figures. * * * "

Sanders, op cit., supra, at 194-200 (footnotes omitted).

bracketed estimates of time of death are not helpful in that.[7] In all likelihood she took her purse with her; it was on the table in the entry way later that morning. Thus she probably came in through the front door. Whether she returned alone or with some one is an open question. At some point the television in her bedroom was turned on.[8]

As shown by exhibit 101, left from the entry way is a short hallway leading to her "suite" in that side of the apartment, her bathroom on the left and bedroom on the right; Rudolph's is on the opposite side. When Rudolph finally returned the front door was closed but unlocked.

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[7] The State presented certain testimony of Robert Hoehn in such a way as to suggest when he and appellant walked to the pool at about 11:00 p.m. and appellant invited him to "window peek" Edward's bedroom, that she was there then and appellant saw her. Neither is shown by testimony given by Hoehn. Asked if appellant told him "anything about what he had seen in that girl's bedroom," Hoehn answered. "No. He didn't get close enough to look in the window that night with me." Hoehn was not asked whether, and did not volunteer that, there was any lighting emanating from the bedroom through the window. Nothing suggests Edwards was home. Appellant "never made any more remarks [to Hoehn] about the young woman's bedroom window."

[8] Although almost always referred to as "bedroom," reality is that Rudolph called it "den and sewing room" and the "bed" a "couch" or "day bed." The bedspread and pillow mentioned in the opinion at p. 931 were on couch; see vol. 1 S.F. at 106, 109, 110 and Vol. 2 S.F. 197, 229. Human blood was on pillow and also on bedspread along with small white specks of plaster, indicating to Lt. Collard that Edwards' was struck on head with statue while lying on bedspread, head on pillow. Vol. 2 S.F. at 197-198. The prosecution argued she was asleep.

She stepped into the entry foyer, saw the figure inside Edwards' bedroom to her left, called out and moved on to her right away from the closed bedroom door. She heard noise of television.

Lt. (then Sgt.) Collard and his team dusted literally every surface throughout the residence and the outer side of the front door and patio door likely to hold a latent print. In Edward's [sic] bedroom he checked "any item possibly handled by the suspect" and other articles, and they moved outwardly door to door, room to room to the outside area. His team lifted a total of thirteen latent prints: one from scissors, others from outer side of Edwards' bathroom door, from door frame of her bedroom door, from inside front door, with largest number "coming out of the dishwasher." Of the prints identified, all belong to Edwards or Rudolph – except a single set assigned to appellant lifted from outer metal frame of patio door. Collard called it Latent No. 1.

Five latents remain unidentified; although he examined an estimated 2500 sets of prints Lt. Collard said he was unable to match any one with a known print, sufficient that he would testify by whom it was made. As to where they were found, though he had just identified Defendant's Exhibit No. 1 as a paper on which he listed each latent and its location, Lt. Collard testified:

> "There are partially, *I believe*, two or three off of the patio door, and *I believe* one of them from the

inner door, *I believe, if I remember correctly,* either the bedroom or the bathroom."[9]

Lt. Collard did not include scissors used to mutilate, perhaps because he had already talked about them. He lifted a latent print from scissors; it was "too faint and not enough details to make a comparison." However, there was enough for Collard to determine the finger leaving the print had a whirl pattern. *No finger of appellant has a whirl pattern.*

The print on scissors could not have been made by appellant. Since he examined some 2500 sets of fingerprints of other persons, Lt. Collard must have been able to rule out that five other latents were left by appellant or Edwards or Rudolph. Collard agreed that "the only thing we have [here today] is that one print" – Latent No. 1. Thus there is no evidence that appellant left his fingerprint anywhere in the entire apartment, and we do not know from this record who left one on the doorway to Edwards' bedroom and four others elsewhere, or when.

Informer Identification

Whenever charged with the offense of murder, Edward Scott Jackson was confined in Smith County jail from November 28, 1976 through trial of the instant cause. In the latter part of July 1977 he achieved trusty

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[9] A "weakened print" was on inside "lower part of the [patio] door," one on "the inner door edge" of the patio door. Other evidence puts Latent No. 6 on doorway to Edwards' bedroom.

status, and retained it during all pertinent times before trial. He had access to a television set.

Putting aside all testimony from this twentytwo [sic] year old witness and others about arrangements to have appellant placed in the same tank with him, when "voluntary" statements and admissions were allegedly made to him by appellant, missing jail records and the like, see *ante* at p. 947, practically everything of significance Jackson claims appellant told him about the death of Linda Jo Edwards could have come from his watching news reports on local television. Indeed, Jackson learned her name from that very source, and surely the color of her hair.[10]

There are, of course, some matters mentioned by Jackson that he could not have gleaned directly from media sources. He had related one in an October 18, 1877 [sic] statement taken by Detective Clark. On his direct examination the prosecution choose not to develop that matter. It came out on cross-examination, *viz*:

> "Q. Did Kerry tell you, allegedly tell you about having a hamburger with this girl?
>
> A. Sir, he said that when he met her, he either met her at an eating place where she works or a girlfriend of hers works. About the hamburger, I don't know.
>
> Q. Are you talking about Linda Jo Edwards?

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[10] At page 934 the majority opinion faithfully reports Jackson's account of what appellant supposedly told him about the killing. However, there is a major omission in the version as told by Jackson: he said nothing about a plaster statue.

A. Yes sir.

Q. How did you know her name?

A. Through the TV.

Q. What else did he tell you about, did he have a date with her?

A. Yes, sir. He said that soon after that he either met her at a bar or took her to a bar.

Q. Do you know which one?

A. No, sir. I don't.

Q. Are we still talking about Linda Jo Edwards?

A. Yes, sir.

Q. So as far as you are concerned, you are telling the Jury then that Kerry knew the victim in this case?

A. Yes, sir.

Q. Which is Linda Jo Edwards?

A. Yes, sir."

The State had known for eighth months that Jackson claimed appellant had said he knew Edwards before her death. Most assuredly that point would be investigated thoroughly for it obviously bore on the prosecutorial theory of its case. Clearly in testimony the prosecutor elicited from Paula Rudolph and other witnesses there is no thought that either Jackson or, assuming he actually said it, appellant was being truthful. On redirect examination the prosecutor did not allude to that matter, nor in his final argument; neither did defense counsel.

As to whether Jackson had some understanding about disposition of the murder charge against him pending trial eighteen months at his own request, on cross examination there was the following exchange:

> "Q. . . . . Did you make a statement on the elevator last week that you were getting out of here, that your case was going to be dropped to manslaughter and you were going to be given credit for the time served if you testified in this case.?
>
> A. No, sir, *not the way you put it*. I could explain that.
>
> Q. No, I just want you to answer the question.
>
> A. No, sir."

Of course, William Fomby would and did swear for appellant that Jackson said he was going to testify for the State because, in more precise terms:

> "He said that this was – that this was an ace in the hole on this case and that the District Attorney said that they were going to *reduce his charge from murder to involuntary manslaughter and give time served.*"[11]

---

[11] In rebuttal, the State called Woody Roark, appointed attorney for Jackson. Roark testified that there had been no plea bargaining for Jackson "since on or about October 27, 1977, [the] time I first became aware of Mr. Jackson's involvement as a potential witness in this cause," and he instructed his client that "I would engage in no plea bargaining nor would he in this case." However, Roark did "think" Jackson talked to an agent of the district attorney "without [his] presence," and acknowledged that "those discussions with [his] client in [his] absence were with [his] permission as attorney of record. . . . "

"The proof of the pudding," as they say, could not then be determined. See *ante*, n. 3, at p. 947. May 6, 1977 Jackson was indicted in Cause No. 7-77-90 for murder, but his case had not been resolved. Sentence of death and commitment in this cause was signed and filed July 17, 1978. Within less than a month, from a certified copy of sentence in said Cause No. 7-77-90 the provable facts are that on August 15, 1978 in the presence of Edward Scott Jackson and his attorney Woody Roark a different judge of a trial court ordered that Edward Scott Jackson who, had been adjudged guilty of *"Involuntary Manslaughter,* A Felony," and whose punishment had been assessed at two years confinement in the penitentiary, be delivered to the Director of Corrections to be confined for "a term of not less than two (2) nor more than two (2) years," and to be *"given credit for 625 days served in the Smith County Jail."*

Considerations

There are three principal incidents produced by the State to make its case: a "figure" whirling in Edwards' bedroom at an early morning hour; appellant's leaving a partial set of his fingerprints on outer side of patio door frame; his purported conversation with Jackson. The first two are as parts of a different puzzle in that one does not easily fit together with the other.

The State sought to make them mesh, it seems to me, with testimony of Hoehn – not all his prejudicial kinky sexual stuff, but that he had let appellant out in a nearby area of the apartment complex. The State argues because appellant was at large in the complex at 12:30 or 12:35 a.m. and was either lusting after Edwards (according to

the Dykes brothers), or going to punish her (according to Jackson), he went straight way to rear of Apartment No. 169, walked up several steps, lifted latch to and opened wooden gate to patio, moved to sliding patio door, opened it, entered and closed it, picked up statue made his way to her room, knocked her out with statue, stabbed her many times with scissors, went to kitchen, selected french knife, went back, pulled her off couch, cut her ear lobe loose and sliced artery and jugular vein, mutilated her body from front, turned it over, stabbed upper back, cut vagina from back to front, also using scissors, and doing what else was done – stripping down to shorts somewhere along the way – in ten minutes, fifteen at the most.

Dr. Gonzales testified that to do such damage "in this area here" alone probably took "five to ten minutes." Vol. 5 S.F. at 877.

The figure whirls and closes bedroom door, and Rudolph assumes it is a boyfriend in the person of Dean Mayfield, and five minutes later when someone opens and closes patio door at the rear, she also assumes the boyfriend is leaving. All is well and she is asleep in five minutes. She did not see Edwards and nothing in this record ever shows Edwards was in her room when Rudolph glimpsed a figure and assumed Dean Mayfield was calling on her.[12]

---

[12] When Paula Rudolph testified at the August examining trial and again at the September bail hearing she seems to have stayed with her description of the person she saw in Edward's

(Continued on following page)

At trial, however, Rudolph says she was wrong then, and logically appellant "fits" the image in her mind. Someone was in the bedroom, to be sure. But the bare fact that his "entry" fingerprints are lifted from outer frame of patio door will not serve to corroborate Rudolph because Lt. Collard opined they would have been made any time from eight o'clock in evening of June 9 to eight o'clock in morning of June 10.[13]

(Continued from previous page)

[sic] bedroom. See, *ante* at p. 949. On January 9, 1978, counsel for appellant filed a motion to take the deposition of Dean Mayfield, alleging, *inter alia*, that Mayfield was represented by an attorney who, though requested, denied him an interview with Mayfield, that Mayfield is a material witness, that Mayfield "was the prime suspect regarding the death of Linda Jo Edwards and, presently, still is a suspect," and that without obtaining testimony from Mayfield, counsel is unable adequately to prepare a defense.

The judge of trial court ordered the deposition taken, and he presided over the taking February 1, 1978. Dean Mayfield did not testify during trial. Nevertheless, included in a supplemental transcript is what purports to be a copy of several introductory pages of the deposition down to the point where Mayfield was sworn to tell the truth – and nothing more. Given that circumstance, we ordered the original deposition forwarded to this Court, and have since determined that neither the fact it was taken was made known to nor any part of it was used before the jury, so there was no occasion for it to become part of the initial record.

[13] In argument a defense lawyer suggested to the jury that shortly before 8:00 a.m. appellant may have come through the back gate, opened sliding door and, leaning in out of curiosity, put his fingerprints on the frame at that time. The facts are that

(Continued on following page)

Furthermore, there is an unidentified latent print on that doorway to Edwards' bedroom, and another on innerside of unlocked front door. There are also two unidentified latents on the frame of patio door. Many of the same factors considered by Lt. Pollard in estimating when appellant's prints were placed on the patio door should also apply to the other two latents found there. That the latents are unidentified means only that known prints of the person or persons leaving them during the same period of time were not available to Pollard. It cannot be rationally concluded that the "figure" was appellant because his prints were identified and the two other latents were not.

In sum, I am unable to agree that the evidence is sufficient and, therefore, I respectfully dissent.

(Continued from previous page)

Rudolph got up about ten minutes to seven, plugged in a coffee maker, walked back to her bedroom, saw the opened wooden gate and went out and closed it, came back in and in looking for her cat pushed open the door to Edwards' room and saw her bloody arm and head, went to call police (in response to her report that Edwards had been beaten, dispatcher said an ambulance would be sent), returned to Edwards room and viewed that scene, backed out of room and apartment and was leaning against a post when an ambulance "came shortly thereafter." Vol. III S.F. 495. Attracted by sight or sound of that ambulance, appellant could have done what counsel contended. It might even explain observation of Randy Dykes that appellant looked "somewhat shocked" upon hearing a news report later in the morning.

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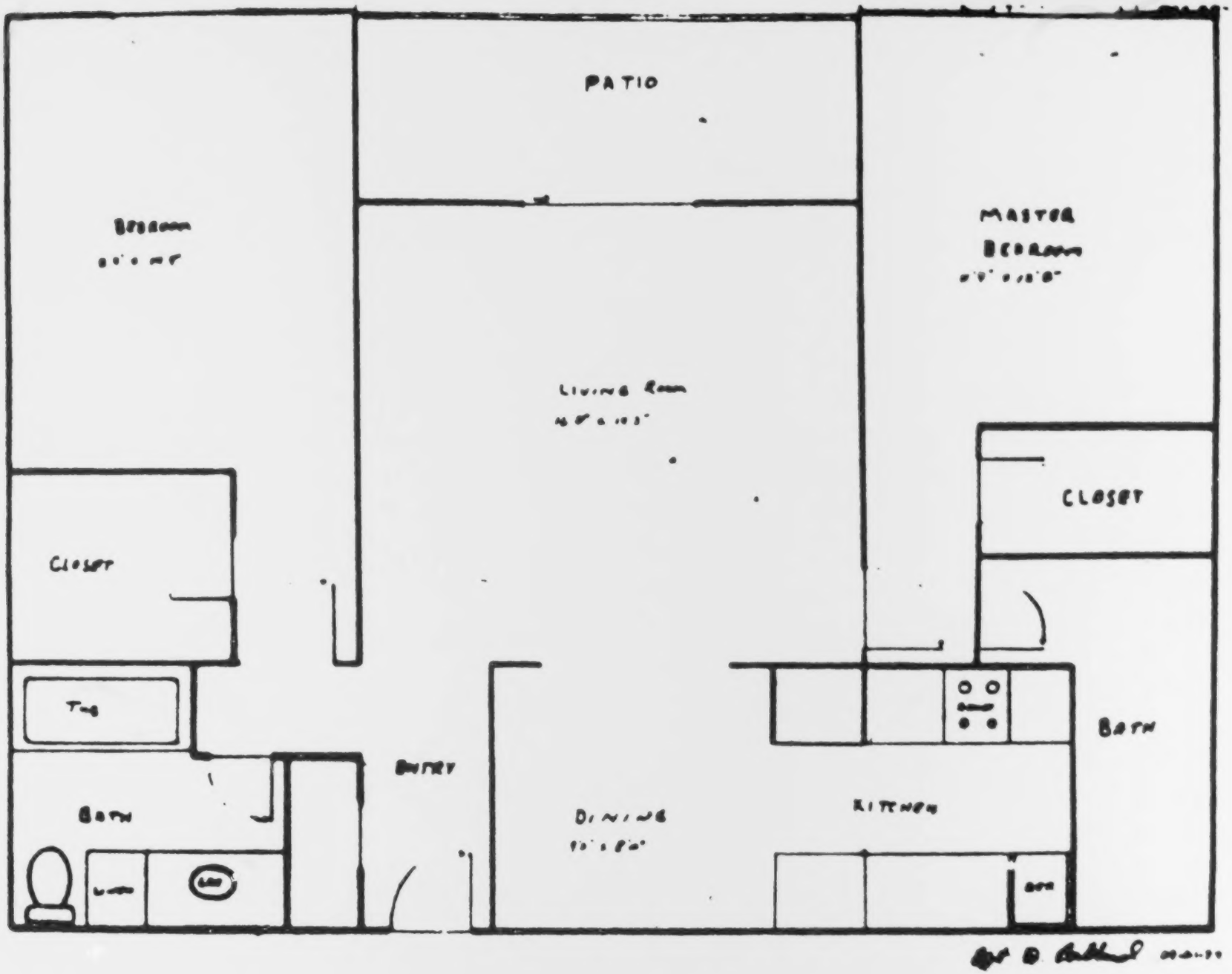

Scale ¼" = Approx 1'0"

77-14477
OVERALL FLOOR PLAN
Apt 165
6009 Rolla old Bullard

Front of Home

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APPENDIX "B"

Kerry Max COOK, petitioner v.
TEXAS. No. 87-7290.

Case below, 741 S.W.2d 928.

Oct. 3, 1988. On petition for writ of certiorari to the Court of Criminal Appeals of Texas. The motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Criminal Appeals of Texas for further consideration in light of *Satterwhite v. Texas*, 486 U.S. ___, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988).

APPENDIX "C"

KERRY MAX COOK, Appellant

No. 63,643 v. - - - - Appeal from SMITH County

STATE OF TEXAS, Appellee

OPINION ON REMAND FROM THE UNITED STATES SUPREME COURT

The appellant was convicted of capital murder and the jury returned affirmative findings to the special issues submitted pursuant to Art. 37.071, V.A.C.C.P., mandating that the trial court assess his punishment at death. On direct appeal his conviction and death sentence was affirmed. *Cook v. State,* 741 S.W.2d 928 (Tex.Cr.App. 1987). The United States Supreme Court granted the appellant's petition for certiorari in Cause No. 87-7290, *Cook v. Texas,* 486 U.S. ___, ___ S.Ct. ___ (1988), and subsequently vacated this Court's judgment affirming the appellant's punishment and remanded it to this Court "for further consideration in light of *Satterwhite v. Texas,* 486 U.S. ___," 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988).

The appellant was convicted of the murder of a young woman in Tyler. The facts of the case and the witnesses' testimony are adequately set forth in this Court's opinion on direct review. *Cook v. State,* supra. Therefore, unless they are essential to a disposition of the error to be reviewed they will not be repeated.

One of the State's witnesses in the appellant's trial was Dr. James Grigson. Dr. Grigson testified essentially that the appellant was a sociopath and would commit other acts of violence in the future. On direct appeal this

Court concluded that such testimony was inadmissible because it violated the appellant's rights under the Fifth and Sixth Amendments to the United States Constitution as detailed in *Estelle v. Smith,* 451 U.S. 454 (1981). Rather than reversing the appellant's conviction this Court instead applied a harmless error analysis to such testimony and relying principally upon *Satterwhite v. State,* 726 S.W.2d 81 (Tex.Cr.App. 1986), *rev'd* 486 U.S. ___, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988), concluded that the testimony was harmless error because "even if Dr. Grigson's testimony had not been admitted, the properly admitted evidence was such that the minds of an average jury would have found the State's case sufficient on the issue of future dangerousness." *Cook v. State,* supra, at 946. Accordingly, since the appellant's other points of error were rejected, this Court, as noted, affirmed his conviction and death sentence.

Inasmuch as we are obligated to review the appellant's death sentence in light of *Satterwhite v. Texas,* supra, it is necessary to review the Supreme Court's opinion in that case. In *Satterwhite v. State,* supra, just as in this case, citing *Estelle v. Smith,* we determined that the defendant's Fifth and Sixth Amendment rights were violated when Dr. Grigson was permitted to testify that the defendant was a sociopath and would pose a continuing threat to society because of his propensity to commit continuing acts of violence. We held, however, that such error, although it in effect constituted a deprivation of the right to counsel, was nevertheless subject to a harmless error analysis. And, as previously noted, we held that the error in admitting the testimony was harmless. Our basis for

such holding was that the other admissible evidence supported the jury's affirmative answer to the second special issue. Art. 37.071, V.A.C.C.P. The Supreme Court granted the defendant's petition for a writ of certiorari to determine "whether a harmless error analysis applies to violations of the Sixth Amendment right set out in *Estelle v. Smith.*" *Satterwhite v. Texas*, supra, at 1796.

Resolving the primary issue, the Supreme Court rejected the defendant's request that a reversal be automatic for violations of the Sixth Amendment right recognized in *Estelle v. Smith*, supra. Instead the Court observed that the Sixth Amendment violation was restricted to the improper admission of Dr. Grigson's testimony and therefore agreed with this Court's holding that a harmless error analysis was appropriate.

The Supreme Court, however, disagreed with the basis upon which we judged the error to be harmless. The Supreme Court, expressly assuming that the other evidence was sufficient to support the jury's answer to the second special issue, stated that this was not the correct inquiry. Instead, according to the Supreme Court, citing *Chapman v. California*, 386 U.S. 18 (1967), the proper inquiry is "whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " *Satterwhite v. Texas*, supra, at 1798.

In holding that a *Chapman* harmless error analysis was applicable to an *Estelle v. Smith*, supra, error the Supreme Court commented that despite the difficulty associated with evaluating the "consequences of an error in the sentencing phase of a capital case . . . ," *Satterwhite*

v. Texas, supra, it was nonetheless confident "that a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected a capital sentencing jury." *Id.* However, other than rejecting this Court's harmless error methodology and expressing their preferred analysis in the conclusory terms of the *Chapman* opinion, the Supreme Court did not further elaborate on the means of calculating the extent of the harm which infected the jury because of Dr. Grigson's improperly admitted psychiatric testimony.

Quite recently, however, this Court briefly explored the evolution of the harmless error doctrine in Supreme Court opinions. As a result, in *Harris v. State*, ___ S.W.2d ___ (Tex.Cr.App., No. 69,366, del. June 28, 1989), we expressly rejected as improper any resolution that an error was harmless simply because there was other overwhelming evidence to support the jury's verdict. This is exactly what the Supreme Court did in *Satterwhite v. Texas*, supra. We also observed that the inherent difficulty in applying a harmless error analysis is that the "rule is expressed in conclusory terms that implicate subjective concerns." *Harris v. State*, supra, at slip opinion p. 29. Accordingly, we also noted that a harmless error analysis is basically "a natural reflection of an inherently subjective [mental] process." *Id.* Consequently, although we did make observations that may or may not be applicable to this case, it is virtually impossible to make any empirical rules or guidelines that would produce unassailable results. The harmless error rule, whether under *Chapman v. California*, supra, or our own Rule 81(b)(2), Tex.R.App.Pro., is plagued with the same indefiniteness

that prompted Justice Potter Stewart to observe about the movie *Les Amants* ("The Lovers") and thus pornography: "I shall not today attempt to define the kinds of material I understand to be embraced within that short-hand definition; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it and the motion picture involved in this case is not that." *Jacobellis v. Ohio,* 378 U.S. 184 (1964) (Stewart, J. concurring).

In *Harris v. State,* supra, we also noted that even though the other evidence cannot alone dictate a conclusion regarding the extent of harm an error produces, "it is absurd to suggest that an appellate court can insulate itself from the reality of the record. . . . " *Id.*, at slip opinion p. 31. Similarly, in implicitly recognizing that in making a harmless error analysis it is still necessary to examine the error in light of the other evidence, the Supreme Court recounted the evidence that was admitted at the punishment stage of Satterwhite's trial. The Court observed that during the punishment phase of the defendant's trial, in addition to Dr. Grigson's testimony, the following evidence was admitted: four prior felony convictions, eight police officers testified that Satterwhite had a bad reputation for being a peaceful and law abiding citizen, one person testified that Satterwhite had shot him during an argument, and a psychologist testified that, among other things, Satterwhite would be a continuing threat to society and commit further acts of violence.

Relative to Dr. Grigson's testimony, the Court noted initially that "[h]is testimony stands out both because of his qualifications as a medical doctor specializing in psychiatry and because of the powerful content of his message." *Id.*, at 1799. The Court, noting that he was the only

physician to testify, then reviewed his testimony and emphasized that he "stated unequivocably that, in his expert opinion, Satterwhite 'will present a continuing threat to society by continuing acts of violence.' " *Id.* Further, Dr. Grigson testified that Satterwhite had no conscience and was " 'severe a sociopath as you can be.' " *Id.* As the Court further noted: "To illustrate his point, he testified that on a scale of one to ten – where 'ones' are mild sociopaths and 'tens' are individuals with complete disregard for human life – Satterwhite is a 'ten plus.' " *Id.* Finally, as the Court notes, "Dr. Grigson concluded his testimony on direct examination with perhaps his most devastating opinion of all: he told the jury that Satterwhite was beyond the reach of psychiatric rehabilitation." *Id.*

The Court concluded its opinion by observing that an affirmative answer to the second special issue (future dangerousness) was critical to the death sentence, and Dr. Grigson was the only psychiatrist to testify and the prosecution emphasized his "powerful and unequivocal testimony." *Id.* Because of this, the Supreme Court stated, "we find it impossible to say beyond a reasonable doubt that Dr. Grigson's expert testimony on the issue of Satterwhite's future dangerousness did not influence the sentencing jury." *Id.*

Although the Supreme Court gave little, if any, recognition to the other evidence admitted during either the guilt/innocence or punishment stages of Satterwhite's trial, as we previously noted, it is impossible to calculate the harmfulness of an error in a vaccum [sic]. See *Harris v. State*, supra. Therefore, in order to review the present case consistent with the analysis utilized by the Supreme

Court in *Satterwhite v. Texas*, supra, it is necessary to compare or contrast the facts of Satterwhite's case with that of Cook's.

Factually, Satterwhite murdered an elderly woman during the course of a robbery by shooting her twice in the head. According to the record of that case, an accomplice witness testified that he told her he had killed the woman because he did not want any witnesses. There is absolutely no question that such a murder is sociopathic and absolutely senseless. If, however, antisocial conduct and senseless acts can be gauged by degrees then Cook's murder was even more atrocious. The record in the present case shows that after having homosexual relations and watching the movie "The Sailor Who Fell From Grace With the Sea," Cook broke into an apartment, hit the deceased in the head with a plaster object, and later killed her. But he apparently wasn't satisfied with just killing her, because when the body was discovered she was nude from the waist down, her right ear lobe had been severed from her head, and her body had been severely mutilated. According to the testimony of one of the investigating officers:

> The body had been severely mutilated. Lt. Collard described how the right breast had a large stab wound, and that the blood on the body indicated "rub marks" or "smear marks, motion marks." There were multiple wounds in the vaginal area, as well as in the throat area. On the lower right side of the bottom lip, one quarter of the lip was missing, and there was a long laceration from the edge of the mouth into the cheek area. A quantity of hair from the upper right-hand top of the head had been removed.

> According to Collard, the entire vagina had been cut out, leaving a large cavity that extended deep into the body. The missing part of the lip and the vaginal parts were never found. A small quantity of hair was discovered at the scene, however, the rest was never found. There were also three stab wounds in the back of the deceased.

Cook v. State, supra, at 931.

The State's forensic pathologist testified that he performed an autopsy on the deceased and among other things also testified in essence that the deceased had been stabbed repeatedly in the groin area while she was still alive. In addition, he testified that parts of the vaginal canal had been removed. In other words, as previously noted, the deceased's vagina had been cut out. He determined that the actual cause of death was due to the laceration of the carotid artery and jugular vein.

During the punishment phase of the trial, in addition to Dr. Grigson, the State called the following witnesses who each testified that the appellant's reputation for being a peaceful and law abiding citizen was bad: a Texas Ranger, a high school principal and vice-principal, a District Attorney of an adjoining county, the constable of an adjoining county, the Chief of Police and a police officer from a nearby city, the Sheriff of an adjoining county, and five local residents. There was also evidence that the appellant had previously been convicted of a felony.

The State also called as a witness a clinical psychologist who had formerly been a staff psychologist for Rusk State Hospital. He testified that approximately three years prior to the trial, he had examined the appellant for

his competency. As a result of his examination he diagnosed the appellant as having a [sic] antisocial or sociopathic personality. He also stated that there was no known cure for being a psychopath and that it is likely the appellant would be a continuing threat to society, irrespective of his environment. Further, according to the psychologist, he had no doubt that the appellant would constitute a danger to society. On redirect, the psychologist testified, quite significantly, and similar to Dr. Grigson's testimony in *Satterwhite v. Texas*, supra, that there was no chance of rehabilitating the appellant.

Although there are similarities in the evidence presented in *Satterwhite v. State*, supra, and the evidence in the present case, the differences are even more pronounced. In *Satterwhite*, for example, in addition to the testimony noted in the Supreme Court's opinion, the record reflects that Dr. Grigson stated that when he interviewed Satterwhite "There was one area of considerable significance. That was an absence of any type of guilt feelings." Further, Dr. Grigson stated "[t]here was absolutely no signs whatsoever of any type of guilt or remorseful feelings." Commenting upon Satterwhite's sociopathic level, Dr. Grigson more or less volunteered that Satterwhite was the type of person "who [would] needlessly take another person's life." And, in response to whether he thought Satterwhite was dangerous, Dr. Grigson responded quite simply "[a]bsolutely." In addition, as the Supreme Court observed, a great deal of emphasis was placed upon Dr. Grigson's testimony by the State in their final argument. Also in *Satterwhite*, Dr. Grigson testified that the defendant was " 'as severe a sociopath as you can be,' " *Satterwhite v. Texas*, supra, at

1798, and continued by asserting that if sociopaths could be evaluated on a scale the defendant would go beyond the scale.

In the present case, however, Dr. Grigson gave his educational and professional background, defined the term "mental status examination," and agreed that he had examined the appellant. He then testified that based upon his examination he had diagnosed the appellant as having an "anti-social personality disorder." Explaining the term, Dr. Grigson stated basically that was someone without a conscience who continually breaks society's rules. He also stated that the appellant was a severe sociopath. And, obviously, Dr. Grigson testified that the appellant would be a threat to society.

However, Dr. Grigson's testimony in this case is no where near as forceful or assertive as that which he gave in *Satterwhite*. Consequently, it was not as critical to the State's proving that the appellant would pose a future threat to society. This must have been apparent to the State because, unlike *Satterwhite*, they referred to Dr. Grigson's testimony in their final argument by making only a passing reference.

In *Satterwhite v. State*, supra, the State, in addition to calling Dr. Grigson to testify as to future dangerousness, also called a psychologist. The psychologist testified that Satterwhite would be a continuing threat to society. The testimony of the psychologist in the present case, unlike that of his counterpart in *Satterwhite*, was much more vehement and more closely parallels the testimony Dr. Grigson gave in *Satterwhite*. For example, it was the psychologist in the present case and not Dr. Grigson that

gave, as the Supreme Court labeled it, the "most devastating opinion of all . . . [the appellant] was beyond the reach of psychiatric rehabilitation." *Satterwhite v. Texas*, supra, at 1719. What must be emphasized is that there is no question as to the admissibility of the psychologist's testimony.

After reviewing the evidence at both the guilt/innocence and punishment stages of the trial and taking appropriate account of the vile, offensive, and sordid facts, and in light of what the Supreme Court stated in *Satterwhite v. Texas*, supra, we find beyond a reasonable doubt that the improper admission of Dr. Grigson's testimony did not contribute to the appellant's punishment.

It must be recognized that in any case in which *Estelle v. Smith*, supra, error is found to infect the proceedings there will necessarily be expert testimony that the defendant is a threat to society because of his propensity to commit further acts of violence. It is therefore necessary to "examine the entire record in a neutral, impartial and even-handed manner . . . . " *Harris v. State*, supra, at slip opinion p. 32, and then evaluate the probable impact the psychiatric evidence had upon the jury and whether it contributed to their verdict. To not do so would in effect constitute a rule that any *Estelle v. Smith*, supra, error will produce an automatic reversal. The Supreme Court specifically rejected this result, as we did.

Accordingly, the appellant's sentence of death is again affirmed.

DUNCAN, III, Judge

(Delivered January 17, 1990)

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Teague, J., dissents and will file an opinion at a later date.

KERRY MAX COOK, Appellant

No. 63,643 v. - - - - Appeal from SMITH County

STATE OF TEXAS, Appellee

DISSENTING OPINION

On original submission this Court found violations of both Fifth and Sixth Amendment rights "by the admission of Dr. Grigson's testimony;" following its own ill-fated analysis in Satterwhite v. State, 726 S.W.2d 81 (Tex.Cr.App. 1986), the majority concluded the errors were harmless beyond a reasonable doubt. Cook v. State, 741 S.W.2d 928 (Tex.Cr.App. 1987).[1]

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[1] After examining other testimony from "untainted" sources, the majority summed up its rationale, *viz*:

> "The facts, already described, show a *brutal vicious murder in which the victim was mutilated and her vagina cut from her body.*
>
> As in *Satterwhite*, we conclude that even if Dr. Grigson's testimony had not been admitted, *the*

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Earlier, the Court engaged in a similar exercise to conclude that admitting testimony of "future dangerousness" by another psychiatrist and a psychologist was harmless under *Satterwhite*. Powell v. State, 742 S.W.2d 353, at 359-360 (Tex.Cr.App. 1987). It did practically the same thing in Bennett v. State, 742 S.W.2d 664 (Tex.Cr.App. 1987), without citing *Satterwhite*.[2]

The decisions of this Court in *Cook*, *Powell* and *Bennett* all met the same fate: its judgment was vacated and the cause remanded for reconsideration in light of Satterwhite v. Texas, 486 U.S. 249, 108 S.Ct. 1792, 108 S.Ct. 192, 100 L.Ed.2d 284 (1988). See Cook v. Texas, 487 U.S. ___,

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> *properly admitted evidence was such that the minds of an average jury would have found the State's case sufficient on the issue of future dangerousness*. The admission of Dr. Grigson's testimony was harmless beyond a reasonable doubt."

Id., at 946. (My emphasis here and throughout this opinion unless otherwise indicated.)

[2] The error there was a statutory violation; the Court applied Tex.R.App.Pro. Rule 81(b)(2), *viz*:

> "On the basis of the preceding summary of the evidence, *especially the facts of the offense itself*, we find that the jury's finding that appellant would be a continuing threat to society was *amply supported*. We further find that the jury's finding *would not have been different had Dr. Grigson's testimony been excluded*. Thus, beyond a reasonable doubt, the error did not contribute to the punishment."

Id., at 672.

109 S.Ct. 39, 102 L.Ed.2d 19 (1988); Powell v. Texas, 487 U.S. ___, 108 S.Ct. 2891, 101 L.Ed.2d 926 (1988), on remand affirmed, 767 S.W.2d 759, reversed, 492 U.S. ___, 109 S.Ct. 3146, 106 L.Ed.2d 551 (1989), on remand No. 67,630 submitted October 25, 1989; Bennett v. Texas, 486 U.S. ___, 108 S.Ct. 2815, 100 L.Ed.2d 917 (1988), on remand affirmed, 766 S.W.2d 227 (Tex.Cr.App. 1989).

Nonetheless, today the majority faults the opinion in *Satterwhite* ("Supreme Court did not further elaborate on the means of calculating the *extent of the harm* which infected the jury . . . "), slip opinion, at 3-4, so resorts to comments about "inherent difficulty in applying harmless error analysis" made in its own opinion in *Harris v. State*, No. 69,366 (still pending on rehearing), slip opinion at 4-5; contrasts the facts in *Satterwhite* (apparently going to the record for that which the Supreme Court did not bother to mention), slip opinion, at 6-10; and, reminiscent of prior rejected conclusions of this Court *ante*, nn. 1 and 2, comes to a strikingly similar one, *viz*:

> "After reviewing the evidence at both the guilt/innocence and punishment stages of the trial and *taking appropriate account of the vile, offensive, and sordid facts*, and in light of what the Supreme Court stated in *Satterwhite v. Texas*, supra, we find beyond a reasonable doubt that the improper admission of Dr. Grigson's testimony did not contribute to the appellant's punishment."

Slip opinion, at 10.

Indeed, except for its treatment of the intervening *Satterwhite v. Texas*, today's opinion is little more than a capsuled restatement of pertinent parts of the majority

opinion on original submission, cf. *Cook*, 741 S.W.2d, at 930-934, 944-946, with its own characterization of testimony of Dr. Grigson, who made a complete psychiatric examination of appellant shortly before trial (see Appendix A), and Dr. Jerry Landrum, a clinical psychologist who had last examined appellant some three years previously for "competency," (see Appendix B), as the Court found on original submission "not in connection with testifying as to the issue of future dangerousness," *Cook*, at 945.[3]

At punishment the State presented character witnesses who testified that appellant's reputation for being a peaceable and lawabiding citizen was bad and introduced the record of a single prior conviction for felony theft of an automobile, followed by testimony of Dr. Grigson and Dr. Landrum; appellant rested behind the State. Thus there was no evidence that appellant had committed a prior criminal act of violence.

In its effort further to "contrast" *Satterwhite*, the majority says the prosecution must have regarded Dr.

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[3] Dr. Landrum is not unknown to this Court; we have documented his willingness to formulate and rejected as "ludicrous" his testimony of his opinion of future dangerousness "from his silent 30 minute observation" of an accused without being informed as to the facts of the case or, if he were, taking them into consideration is reaching his evaluation. See Garcia v. State, 626 S.W.2d 46, at 50-51 (Tex.Cr.App. 1981) ("testimony cannot be seriously considered in assaying the evidence to support the finding to special issue no. 2"). In the instant cause, Dr. Landrum did not make a contemporaneous examination of appellant and, as the State itself points out, Dr. Landrum expressed his opinion "even without any knowledge of conviction in this case." State's Brief, at 7. (VII SF 1222).

Grigson's testimony "not as critical to [its] proving that the appellant would pose a future threat to society," because they referred to his testimony "by making only a passing reference." Slip opinion, at 9-10. However, the record reveals that in his opening argument the prosecutor immediately been a psychoanalytic discourse, *viz*:

> " . . . [B]ut probably the saddest portion of this whole affair is that you cannot feel sorry for people like Kerry Max Cook because they won't accept your sorrow. They will break down in tears under the appropriate occasion and they will blame their problems on other people; they will shift the burden of their responsibility in life in any direction except toward themselves. You heard the psychiatrist and the psychologist tell you they have no sense of social conscience and they will evoke your sorrow, they will reach for your sympathy and your pity and use it for the expediency of the moment. When that moment is gone and when that necessity is gone for it, then they revert to their pattern of conduct in life."

VII SF 1242.[4]

After discussing aspects of "this whole perverse, morbid parade of human tragedy," the prosecutor returned to his opening theme, i.e., behavioral condition of appellant, *viz*:

> ". . . . [To ask ourselves is that right or wrong] is totally absent from the mind of Kerry Max

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[4] Opening on that theme, the prosecutor would elaborate variations during his argument and then close by reprising it crescendo. See *post*.

> Cook. You have heard a professional psychiatrist with many, many years of experience. You have heard a professional psychologist with ten years experience in evaluating dangerous human behavior come in the Courtroom. Now, there are many, many members of both [professions] the Defense team could have hired to analyze Kerry Max Cook, if there was a possibility of producing a professional opinion that would have been favorable to Kerry Max Cook, but there was none . . . . Now, the reason [none] was called . . . is that that evidence doesn't exist, Kerry Max Cook is what he is. He is a living part of human tragedy."

Id., at 1247-1248.[5]

He went on to argue, "The only rational decision in looking at the case of Kerry Max Cook is . . . to remove him from this life." Developing that notion, the prosecutor pointed to the testimony of Dr. Landrum that "there is no remote possibility that Kerry Max Cook will ever be rehabilitated," *id.*, at 1249-1252. He then discussed other evidence on punishment and wound up that phase by returning to Dr. Grigson, *viz*:

> "You heard Dr. Grigson, a very professional man tell you about the categories involved in psychiatric evaluations. Didn't you hear something in every one of those categories that applied to Kerry Max Cook? * * *

---

[5] When it came his turn, the trial judge permitted first counsel for appellant to assert the defense had neither psychologist nor psychiatrist because appellant "has no money" to pay their fees.

> He said a person who freeloads off of society the world owes him a living. The facts of the evidence in this case shows that that is exactly Kerry Max Cook, he is mooching off everybody, room and board, cigarettes, beer, whoever he could hustle into paying his way in life. He said it is a mind who has no social responsibility in any form or fashion. Kerry Max Cook all over again the first time. The second time you saw all over the wall of this Courtroom, no social responsibility whatsoever. He has no conscience. Dr. Grigson told you that the man was impossible to rehabilitate, that he was not susceptible to rehabilitation, that he could not begin to understand what the term was."

VII SF 1256-1257. Asking rhetorically why a minister or neighbor or close friend of the family has not come forward in behalf of appellant, the prosecutor opined there is none; he condemned one witness who testified for appellant in the guilt stage ("broken every rule that the world has to offer"), and concluded that "you have to control them in the interest of self-preservation and preservation of society." *Id.*, at 1258-1259.

First counsel for appellant mentioned lack of funds, see n. 4, *ante*, and asked the jury not to kill him. VII SF 1259-1262. Second counsel delved into the proposition that "psychiatry and the related field of psychology is an inexact science," arguing that maybe "to predict future behavior based on past behavior . . . is all we have to predict the future." He suggested that, having observed appellant during the course of the trial, the jury may be more accurate than Dr. Grigson and Dr. Landrum, reminding them that the latter had cited repeated use of mind altering drugs and arguing that there might be a

cure within appellant's lifetime. He then turned to deterrent value of capital punishment and practically conceded special issues 1 and 3; he believed confinement for life raised a reasonable doubt as to special issue 2, and asked that it be answered "no," because "what I am doing is pleading for the life of my client." *Id.*, at 1262-1273.

In his closing argument, the prosecutor first concentrated on special issue 2, *viz*:

> " . . . Who knows the answer to this question, but when we are confronted with these set of facts in an area we do not understand, human behavior, we rely on experts. . . . and in this we relied on experts in this case. We said give us your judgment in this case, and they have done so. They were not impeached in any form, they were not rebutted in any form and do you think that they would derive any morbid pleasure in telling you that you have no other alternative other than to send a man to his death or he is going to hurt somebody or endanger everybody around you."

Id., at 1273-1274. Alluding to remark by defense counsel about putting a hunting dog to sleep, the prosecutor concluded:

> " . . . That is [sic] situation in this case. Kerry Max Cook has a disease, it is sociopathic and a psychopathic disease and the young man must be put to sleep. That is the only alternative, the only solution to the problem posed and on behalf of the people of the county, I ask that if there is anyone on the Jury who cannot do this, just simply do not answer one of the issues and we will start all over again Monday and we will go through this routine until we find twelve

> people who must do what must be done in this case.
>
> * * * You have shown reason and responsibility in doing away with the problem that is a continuing threat to our community. I ask that you follow through with it and make sure the problem does not arise again. Thank you, Ladies and Gentlemen of the Jury."

Id., at 1274-1275.

In my judgment this cause may not reasonably be distinguished in principle from *Satterwhite v. Texas;* thus I respectfully dissent.

CLINTON, Judge

DELIVERED: January 17, 1990
EN BANC
PUBLISH

APPENDIX "D"

KERRY MAX COOK, Appellant

NO. 63,643 v. - - - - Appeal from SMITH County

THE STATE OF TEXAS, Appellee

OPINION ON REHEARING AFTER REMAND FROM THE UNITED STATES SUPREME COURT

Kerry Max Cook, appellant, was indicted for the offense of capital murder in the death of Linda Jo Edwards alleged to have been committed on or about June 10, 1977 in Tyler, Smith County, Texas. Appellant was convicted and sentenced to death on July 13, 1978. On direct appeal to this Court we affirmed appellant's conviction. *Cook v. State,* 741 S.W.2d 928 (Tex.Cr.App. 1987). The appellant then petitioned the United States Supreme Court for a writ of certiorari, alleging primarily Fifth and Sixth Amendment violations due to the admission of psychiatric testimony of Dr. James Grigson during punishment. The Supreme Court granted appellant's petition in cause No. 87-7290, *Cook v. Texas,* 488 U.S. 807, 109 S.Ct. 39, 102 L.Ed.2d 19 (1988) and vacated our judgment and remanded the case to us for consideration in light of *Satterwhite v. Texas,* 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988), which also dealt with Fifth and Sixth Amendment violations due to admission of the same Dr. Grigson's testimony at punishment. The issue became whether a harmless error analysis applies to violations of Fifth and Sixth Amendment rights set out in *Estelle v. Smith,* 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). On remand, we again affirmed the appellant's conviction concluding that while error existed, it was harmless. On

June 13, 1990, we granted appellant's motion for rehearing in order to reconsider our earlier decision. After further consideration we withdraw our previous opinion of January 17, 1990.

Appellant's case will be reconsidered once again in light of *Satterwhite*. In his motion for rehearing, appellant raises five grounds for rehearing:

> 1. First, the Court has misconstrued the relative reliance the prosecution placed on Dr. Grigson's testimony during summation;
>
> 2. Appellant requests that the Court reconsider whether it has misconstrued the relative importance of Dr. Grigson's testimony compared to other admissible evidence in the *Satterwhite* and this case;
>
> 3. Whether there was just as much, if not more, compelling evidence of future dangerousness, apart from Grigson's testimony, introduced in *Satterwhite;*
>
> 4. Whether the nature of the murder, i.e. more gruesome than that in *Satterwhite,* is indicative of future dangerousness; and
>
> 5. What should be the relevance of the difference in prior criminal records of John Satterwhite and Kerry Max Cook.

We will resolve these issues by addressing appellant's first two grounds for rehearing; the remaining three grounds will not be discussed separately since all lead to the ultimate inquiry, towit: whether we can conclude "beyond a reasonable doubt" that the erroneously admitted testimony of Dr. Grigson did not contribute to the verdict obtained.

We grant rehearing to review the erroneously admitted testimony by way of the Supreme Court's analysis in *Satterwhite*. The error in *Satterwhite* and herein are remarkably similar. In both *Satterwhite* and *Cook*, the following facts are present:

> 1) Dr. James Grigson, a well known and experienced psychiatrist, examines the appellants without notice to their defense counsels.
>
> 2) Dr. Grigson is permitted to testify on future dangerousness at the punishment stage over defense objections.
>
> 3) A second expert who is a psychologist by training with considerably less experience than Dr. Grigson also testifies on future dangerousness. This testimony is admissible.
>
> 4) In each trial, Dr. Grigson's testimony is clearly more resolute and explicit than that of the psychologist.
>
> 5) Dr. Grigson's testimony is alluded to in final argument by the State with emphasis on the future dangerousness issue. The testimony of the psychologist in each case is also referred to in final argument.
>
> 6) Both appellants are given the death penalty by each jury.
>
> 7) Dr. Grigson's testimony is subsequently held to be in violation of each appellant's Fifth and Sixth amendment rights.

The Supreme Court fashioned the issue in *Satterwhite* as follows: "[t]he question in this case is whether it was harmless error to introduce psychiatric testimony

obtained in violation of that safeguard [Sixth Amendment][1] in a capital sentencing proceeding." *Satterwhite*, 108 S.Ct. at 1795. We are confronted again with the same issue.

I.

A brief review of the facts is in order. The murder of Linda Jo Edwards in Tyler, Texas was a heinous crime, the details of which are outlined in *Cook v. State*, 741 S.W.2d 928, 931-33 (Tex.Cr.App. 1987). In short, the deceased had been hit in the head with a plaster object, attacked by multiple stab wounds, and the body was severely mutilated, parts of which were never found. Once appellant became a suspect, and after he was represented by counsel, he was examined by Dr. Grigson, a psychiatrist. The psychiatric examination occurred at the apparent request of the District Attorney of Smith County without notice to counsel and without court order. Appellant was moved from Smith County to Dallas County for the examination, which took place in the hospital division of the Dallas County Jail and was completed in an hour and a half. There was no showing that *Miranda* warnings were given to the appellant or that Dr. Grigson informed him that the examination was for the purpose of determining his

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[1] The referenced safeguard is the Sixth Amendment right of defendants formally charged with capital crimes to consult with counsel before submitting to psychiatric examinations designed to determine their future dangerousness; the Supreme Court recognized such in *Estelle v. Smith*, supra, which was also a Texas case in which the testimony of Dr. James Grigson was at issue.

future dangerousness. *Cook*, supra at 943. Dr. Grigson testified at the punishment phase of the trial over appellant's objection, hence the Fifth and Sixth Amendment violations as defined by the Supreme Court in *Estelle v. Smith*, supra, 451 U.S. at 469.

II.

In his first point of error, the appellant contends that the reliance the prosecution placed on Dr. Grigson's testimony during summation in *Cook* was more so than that relied upon by the prosection in *Satterwhite*. We agree with the appellant on this point.

Dr. Grigson's testimony was that Cook has an antisocial personality disorder termed sociopath and after defining it, and stating that it is not an illness but "simply a descriptive term to describe an individual which has certain personality characteristics," states that Cook is "at the very end, the very most severe where you will find of the sociopath." After responding that such a person has a complete disregard for another human being's life, Dr. Grigson stated, "[i]t's my opinion that Mr. Cook certainly will, from a medical psychiatric standpoint probability, continue to behave and act in a way that does represent a very serious threat to the people within our society." In response to whether prison society is included, the doctor testifies: "[i]t would not matter where he might be, whether he was free in the free world or whether he was institutionalized. He would present a real threat to people that found themselves in that same setting with him, whether it is prisoner guards or rather free people." In

response to how severe a threat Mr. Cook would be to others, the doctor responds:

> "It is extremely severe. You can't come any more severe than that. If I had the least doubt, if I had any question within my mind, I certainly would not mind telling you that. I feel absolutely one hundred percent certain that he is and will continue to be a threat no matter where he is."

We have concluded that the prosecution did indeed refer notably to Grigson's testimony in its summation. After arguing that appellant should be executed and pointing to the psychologist's testimony that he could not be rehabilitated, the prosecutor refocused on Grigson's testimony:

> "You heard Dr. Grigson, a very professional man tell you about the categories involved in psychiatric evaluations. Didn't you hear something in every one of those categories that applied to Kerry Max Cook?
>
> * * *
>
> He said it is a mind who has no social responsibility in any form or fashion. Kerry Max all over again the first time. The second time you saw all over the wall of this courtroom, no social responsibility whatsoever. He has no conscience. Dr. Grigson told you that the man was impossible to rehabilitate, that he was not susceptible to rehabilitation, that he could not begin to understand what the term was."

While Dr. Grigson did not testify verbatim to the above quote "impossible to rehabilitate," this was the implication of his testimony and the prosecutor aptly attributes

this testimony to Dr. Grigson in his closing argument. In *Satterwhite,* the Supreme Court writes:

> His [Dr. Grigson's] testimony stands out both because of his qualifications as a medical doctor specializing in psychiatry and because of the powerful content of his message. Dr. Grigson was the only licensed physician to take the stand.
>
> * * *
>
> He explained that Satterwhite has "a lack of conscience" and is "as severe a sociaopath [sic] as you can be."
>
> * * *
>
> Dr. Grigson concluded his testimony on direct examination with perhaps his most devastating opinion of all: he told the jury that Satterwhite was beyond the reach of psychiatric rehabilitation.

Satterwhite, 108 S.Ct. at 1799. After quoting a portion of the prosecutor's final argument which alludes to Dr. Grigson's testimony, the Supreme Court concluded that the error was harmful. We find it hard to conclude otherwise given the similarity of the testimony herein.

III.

In his second ground for rehearing, appellant requests this Court to reconsider whether it has misconstrued the relative importance of Dr. Grigson's testimony compared to other admissible evidence in *Satterwhite* and the matter herein.

It is not the role of the appellate court to determine the harmfulness of an error simply by examining whether there exists overwhelming evidence to support the defendant's guilt. *Harris v. State*, 790 S.W. 2d 568, 585, (Tex.Cr.App. 1989) reh. denied 1990. The Supreme Court opines in *Satterwhite:*

> The Court of Criminal Appeals thought that the admission of Dr. Grigson's expert testimony on this critical issue was harmless because 'the properly admitted evidence was such that the minds of an average jury would have found the State's case [on future dangerousness] sufficient . . . even if Dr. Grigson's testimony had not been admitted.' [*Cook*] 726 S.W.2d, at 93. The question, however, is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved 'beyond a reaonable [sic] doubt that the error complained of did not contribute to the verdict obtained.' *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed. 2d 705 (1967); *Satterwhite*, 108 S.Ct. at 1798.

It is the State's burden to prove beyond a reasonable doubt that the jury did not consider Dr. Grigson's testimony on future dangerousness when it arrived at its finding.[2] The State asserts in its brief that we look to Dr.

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[2] "Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." [Citation omitted] *Chapman*, 386 U.S. at 24.

Landrum's testimony and the testimony of the thirteen character witnesses who all testified to future dangerousness. The position then becomes that a jury would have reached the same result based upon this evidence alone. This, however, does not answer the inquiry, "what impact did Dr. Grigson's testimony have on this same jury, if any?"

In *Satterwhite*, the State also introduced the testimony of Bexar County psychologist, Dr. Betty Lou Schroeder, on future dangerousness. When comparing the testimony of Dr. Schroeder in *Satterwhite* to that of Dr. Landrum who testified in the matter herein, the two are relatively the same insomuch as they both concluded that each appellant would be a continuing threat to society. Dr. Schroeder testified that she found Satterwhite to be a "cunning individual" and a "user of people," with an inability to feel empathy or guilt. She testified that in her opinion, Satterwhite would be a continuing threat to society through acts of criminal violence. *Id.* Dr. Schroeder's testimony was supported by recent examinations of Satterwhite wherein he had been informed of his *Miranda* rights and had also granted a release. Dr. Schroeder's testimony was properly admitted and her opinion was also referred to by the State in summation.

Dr. Landrum, a clinical psychologist, examined Cook prior to this offense, the indictment, and the appointment of counsel. Dr. Landrum's examination of Cook was not in connection with testifying on the issue of future dangerousness; this examination occurred in his capacity as a staff psychologist at Rusk State Hospital. The examination was performed within the three years prior to the June 1978 trial testimony. This testimony was properly

admitted. Dr. Landrum defined Cook as sociopathic. When asked to categorize Cook, he responded, "All factors considered, I would say severe." At other points in testimony, Dr. Landrum expressed the opinion of Cook that "it is likely that he will be a continuing threat to society" and "would have a high probability of acting out in an aggressive and harmful manner." In response to whether Cook would be a continuing threat even in a prison society, Dr. Landrum responds, "Yes." In response to whether there was any doubt in his mind that Cook will constitute a continuing threat, the doctor responds, "No." And in response to whether there is even a remote possibility that Cook will be rehabilitated, the doctor replies, "In my opinion, there is not."

The prosecutor referred to Dr. Landrum's testimony in summation in the following manner: After first remarking, "[y]ou have heard a professional psychiatrist with many, many years of experience [referring to Dr. Grigson]," his next statement was as follows:

> "You have heard a professional psychologist with ten years of experience in evaluating dangerous human behavior come in this Courtroom.. . . . You heard that young psychologist on the stand when he said when you get down to the situation of a case, it's rarely, if ever, in looking at a psychopath, are you going to have any difference of professional opinion, when you narrow it down to a specific case.
>
> "There is only one choice in this case and I thought perhaps that I misunderstood that psychologist. I said, Doctor, is there any – in your professional opinion – is there any possibility

> that Kerry Max Cook will be – any remote possibility. I even went so far as to say remote possibility that Kerry Max Cook will ever be rehabilitated. He said no, there is not. There is no possibility."

The prosecutor referred to Dr. Landrum as the "young psychologist" and never invokes his name in summation; whereas he makes reference to Dr. Grigson's testimony at the same time as "a psychiatrist of many, many years" and he invokes Dr. Grigson's name in summation on two occasions. Dr. Landrum was the only other expert to testify and he admited [sic] in testimony that it may have been up to three years since he examined Cook.

The evidence admitted in *Satterwhite* revealed a history of some four convictions of violent acts ranging from aggravated assault to armed robbery including the shooting of his mother's former husband. Eight police officers testified that Satterwhite's reputation for being a peaceful and law abiding citizen was bad. *Satterwhite,* 108 S.Ct. at 1798. Review of Cook's prior history reveals no violent crimes. His one prior offense was theft of an auto. There were thirteen witnesses who testified that Cook's reputation for being a law abiding and peaceful citizen was bad.

In *Satterwhite,* Dr. Grigson told the jury that Satterwhite was beyond the reach of psychiatric rehabilitation. *Id.,* at 1799. His testimony is not so very different here particularly in light of the prosecutor's argument to the jury which refers to Dr. Grigson when he repeats that the psychiatrist told them "the man was impossible to rehabilitate."

The Supreme Court arrived at its decision that admission of Dr. Grigson's testimony was harmful error in *Satterwhite* by stating that "Dr. Grigson was the only psychiatrist to testify on this issue (future dangerousness) and the prosecution placed significant weight on his powerful and unequivocal testimony." *Id.* The same applies to the facts herein. While the prosecution in both the *Satterwhite* and Cook trials did elicit future dangerousness testimony from both psychologists, it is clear that the emphasis placed upon the Grigson testimony herein is comparatively more eminent.

Tex.R.App.Proc., 81(b)(2), which is a Texas codification of *Chapman* provides:

> "If the appellate record in a criminal case reveals error in the proceedings below, the appellate court shall reverse the judgment under review, unless the appellate court determines beyond a reasonable doubt that the errors made no contribution to the conviction or to the punishment."

It is impossible to conclude that the jury was convinced of Cook's future dangerousness required of special issue two of Article 37.071(b)(2) without the aid of Dr. Grigson's testimony. Our ultimate concern here is whether the Grigson testimony made a contribution to Cook's punishment. We cannot say, "beyond a reasonable doubt" that it did not contribute to the punishment.

Accordingly, the conviction is reversed and the cause is remanded for a new trial.

OVERSTREET, JUDGE

(Delivered September 18, 1991)

EN BANC
PUBLISH

Miller & White, JJ., dissent;
Benavides, J., concurs in result

KERRY MAX COOK,
Appellant

v.

THE STATE OF TEXAS,
Appellee

Appeal from the 241st District Court of Smith County

No. 63,643

CONCURRING OPINION

After personally reviewing and comparing the record of Cook's trial with the record in *Satterwhite v. Texas*, 486 U.S. 249 (1988), I concur that this case cannot be distinguished in any meaningful sense. I write, however, to emphasize (1) that the United States Supreme Court's harmless error analysis in *Satterwhite* is not consistent with the analyses in its prior cases that have never been overruled and (2) that the outcome in the instant case would be different under the analyses in those prior cases.

As we noted in *Harris v. State*, 790 S.W.2d 568, 586 (Tex.Cr.App. 1989), "[t]he United States Supreme Court has been . . . evasive . . . when it comes to establishing any coherent standard to judge harmless [federal constitutional] error." The simple truth is that the Supreme Court has been inconsistent and has alternately embraced

and rejected the "overwhelming evidence" and "cumulative evidence" tests for determining when such constitutional error is harmless beyond a reasonable doubt. *Id.* See 3 LaFave & Israel, *Criminal Procedure* § 26.6(e) (1984 & Supp. 1991); Field, *Assessing the Harmlessness of Federal Constitutional Error,* 125 U. Penn. L. Rev. 15, 16 (1976);[1] 1 Weinstein & Berger, *Weinstein's Evidence* § 103[08] (1991); Comment, *Harmless Constitutional Error,* 33 Baylor L. Rev. 961 (1981).

In *Chapman v. California,* 386 U.S. 18 (1967), the Court held that a federal constitutional error should be considered harmless if the prosecution can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." The Court stated also that, with regard to evidentiary errors, "[a]n error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be conceived of as harmless." This holding plainly created a strict standard that looked not to whether the jury could have convicted without the error, or whether the appellate court would have affirmed without the error, but to whether the error *might have influenced* the jury in reaching its verdict. In other words, under *Chapman,* a constitutional error could not be considered harmless if there was a reasonable possibility that the error, either alone or in context, moved the jury from a state of nonpersuasion to one of persuasion beyond a reasonable doubt as to the issue in question.

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[1] Professor Field's analysis of harmless error is perhaps the most comprehensive and persuasive presently available.

The decision in *Harrington v. California*, 395 U.S. 250 (1969), marked the next step in the progression of the harmless error doctrine. In that case, the Court, purporting to rely on *Chapman*, held harmless two erroneously admitted statements of Harrington's co-defendants that placed Harrington at the scene of the crime. The Court held the statements harmless because Harrington's own statement and other evidence properly admitted also placed him at the crime scene. It is uncertain whether the Supreme Court was attempting to establish an overwhelming evidence test or a cumulative evidence test.[2] See Field, supra, 125 U. Penn. L. Rev. at 38-39.

> This approach continued in *Milton v. Wainwright*, 407 U.S. 371 (1972), and *Schneble v. Florida*, 405 U.S. 427 (1972). In both cases the Supreme Court again claimed that the errors were harmless, despite *Chapman*, by noting that there was overwhelming evidence of guilt. Recently, in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), in extending the harmless error rule to a violation of one's Sixth Amendment right to cross-examine a witness, the Supreme Court, at least implicitly, applied an overwhelming evidence standard to the error. Similarly, in *Rose v. Clark*, 478 U.S. 570 (1986), the Court cited the overwhelming evidence of guilt in determining that improper jury instructions that incorrectly

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[2] "While some writers have identified the rule adopted by the majority opinion in *Harrington* as a cumulative evidence test, a majority of the Court clearly examined the untainted evidence in the case and found it to be overwhelming." Campbell, *An Economic View of Developments in the Harmless Error and Exclusionary Rules*, 42 Baylor L. Rev. 499, 509 (1990).

> shift the burden of proof to the defendant was an error subject to a harmless error analysis.

Harris, 790 S.W.2d at 586.

In *Satterwhite*, however, the Court, without explanation, signalled a clear break with the overwhelming evidence and cumulative evidence tests it had previously utilized and returned to the strict position announced in *Chapman*. This shift may indicate that the Court, in applying the harmless error test, will no longer focus primarily on the reliability of the outcome of a criminal proceeding – or it may indicate that the Court has accepted the arguments made by the critics of the overwhelming evidence and cumulative evidence tests.[3] See, e.g., *Harris*, 790 S.W.2d at 600-604 (Clinton, J., dissenting); Field, supra, 125 U. Penn. L. Rev. at 32-36 & 41-47.

The *Chapman* formulation of harmless error prevailed again in *Arizona v. Fulminante*, 111 S.Ct. 1246 (1991). There, the Court held that the defendant's coerced confession, although cumulative of a second (lawfully admitted) confession, was not harmless beyond a reasonable doubt because, under the facts of the case, "the jury's assessment of the [lawfully admitted] confession could

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[3] "Alternatively, the *Satterwhite* decision may be more of an aberrational response to an evidentiary area of the law that the Court finds particularly offensive – psychiatric testimony concerning future conduct." Campbell, supra, 42 Baylor L. Rev. at 524.

easily have depended in large part on the presence of the [coerced] confession." *Fulminante,* 111 S.Ct. at 1258.[4]

In short, the continued vitality of the overwhelming evidence and cumulative evidence tests is in grave doubt, although the cases utilizing those tests have never been explicitly overruled. Were either test still available, it would be appropriate for this Court to affirm Cook's conviction; that is, the untainted evidence considered by the jury at the punishment stage of Cook's trial was both "overwhelming" and "cumulative", as the Supreme Court has previously used those terms. The evidence showed, first of all, that Cook committed a crime of unspeakable horror, that his reputation for being peaceful and law-abiding was universally bad, and that he had a criminal record. That evidence, coupled with the untainted testimony of the psychologist that Cook was a severe sociopath impossible to rehabilitate, would have amply satisfied either the overwhelming evidence test or the cumulative evidence test.

One can only speculate that the Supreme Court was attempting, in *Satterwhite,* to find some middle ground upon which to balance the truth-finding function of a criminal trial with the Court's responsibility to protect the integrity of the process that led to Satterwhite's conviction and sentence. With this noble pursuit, I have no

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[4] Chief Justice Rehnquist, joined by Justices O'Connor and Scalia, would have held the erroneously admitted confession to be "a classic case of harmless error." 111 S.Ct. at 1266. This expression obviously represents continued clinging by three justices to some form of overwhelming evidence or cumulative evidence test.

disagreement. However, because of the inconsistency and uncertainty that this pursuit has left in its wake, I and other appellate judges across this country can only be confused and dismayed.

With these comments, I join in the judgment of the Court.

CAMPBELL, J.

En Banc

Publish

Delivered September 18, 1991.

Joined by McCormick, P.J.

APPENDIX "E"

COURT OF CRIMINAL APPEALS OF TEXAS

CLERK'S OFFICE

Austin, Texas October 30, 1991

Dear Sir:

I have been instructed to advise that the Court has this day denied the State's Motion for Rehearing in Cause No. 63,643 , KERRY MAX COOK

vs.

THE STATE OF TEXAS Appellee.
(Dissenting Opinion Judge Miller Joined by Presiding Judge McCormick & Judge White)

Sincerely yours,

Thomas Lowe, Clerk

APPENDIX "F"

KERRY MAX COOK, Appellant TC-91-33-035

No. 63,643 v. Appeal from SMITH County

THE STATE OF TEXAS, Appellee

OPINION DISSENTING TO DENIAL OF STATE'S MOTION FOR REHEARING

This Court determined in *Mallory v. State*, 752 S.W.2d 566 (Tex.Crim.App. 1988), that Tex.R.App.Proc. 81(b)(2)[1] was the rhetorical and semantic equivalent of the harmless error standard for constitutional errors announced by the Supreme Court in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In *Harris v. State*, 790 S.W.2d 568 (Tex.Crim.App. 1989), this Court, speaking through Judge Duncan, reviewed Supreme Court precedent and established for the first time a coherent standard by which to judge harmless error under Rule 81(b)(2). Noting the inherent subjectivity in an harmless error analysis, the Court stated that the most it "[could] do in guiding future harmless error analysis is to state a general formulation of what 81(b)(2) requires, set out general considerations which may be relevant, and trust

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[1] Texas Rule of Appellate Procedure 81(b)(2) states in pertinent part:

> If the appellate record in a criminal case reveals error in the proceedings below, the appellate court shall reverse the judgment under review, unless the appellate court determines beyond a reasonable doubt that the error made no contribution to the conviction or to the punishment.

individual judges to use these observations in their personal calculus." *Id.* at 587.

The predominant concern of the appellate court in conducting a harmless error analysis is of course the error itself. The appellate court must determine to the extent possible the impact of the error upon the trial process. *Id.* This determination necessarily requires a review of the entire record at trial, especially the other evidence presented at trial. The Court was quick to caution, however, that an error is not rendered harmless merely because there is overwhelming evidence of the guilt of the accused, but "[i]f overwhelming evidence dissipates the error's effect upon the jury's function in determining the facts so that it did not contribute to the verdict then the error is harmless." *Id.* Thus, we turn our focus to "the error" and its effect upon the jury, if any.

To focus upon the error, the appellate court should first determine the source and nature of the error committed. As noted above, the impact of the error will turn partly upon the facts of the particular case, but it will also be affected by the State's emphasis upon the error, e.g. in its jury argument. Since the appellate court is determining the impact of the error on the jury, *id.* at 587, the court must consider how much weight a juror would probably place upon the error. The court must also consider probable collateral implications of the error within the unique facts of each case. *Id.* Finally, whether declaring the error harmless would encourage the State to repeat the error with impunity must be considered by the reviewing court. *Id.* See also discussion in *Belyeu v. State*, 791 S.W.2d 66, 74 (Tex.Crim.App. 1989).

The *Harris* decision then explained the proper procedure utilizing these considerations to calculate the harmfulness, or lack thereof, of the error. The Court stated:

> General consideration having been set out, we are left only to provide a skeleton on which to place them. A procedure for reaching this determination should: first, isolate the error and all its effects, using the considerations set out above and any other considerations suggested by the facts of an individual case; and second, ask whether a rational trier of fact might have reached a different result if the error and its effects had not resulted.

Harris, 790 S.W.2d at 588. With these principles in mind, I address the majority opinion. See *Cook v. State*, ___ S.W.2d ___ (Tex.Crim.App. No. 63,643 delivered September 18, 1991) (Opinion on Rehearing after Remand from the United States Supreme Court).

The most glaring error in the majority opinion is its failure to conduct a harmless error analysis in light of *Harris*. Although the majority gratuitously cites to the *Harris* opinion at p. 5, thus implicitly recognizing the validity of its 81(b)(2) standard, the majority nevertheless engages in a comparative analysis of this case with *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 102 L.Ed.2d 19 (1988). The State is correct in its brief that this Court simply relied on the superficial similarities between the facts of this case and the facts of *Satterwhite* in conducting its harmless error analysis. Such analysis ignores the principles of *Harris* which instruct the reviewing court to consider the impact of the error on the *appellant's* trial in

light of the "considerations suggested by the facts of an *individual* case." *Harris*, 790 S.W.2d at 588 (emphasis added). Appellant is also denied a meaningful appeal of his individual case.

Utilizing the proper harmless error analysis under Rule 81(b)(2), as sanctioned by this Court, I conclude the error in admitting Dr. Grigson's testimony at punishment was harmless. The error in this trial stems from the use of evidence obtained in violation of appellant's Fifth and Sixth Amendment rights as set out in *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). Using this evidence, Dr. Grigson was allowed to testify and express his opinion as to appellant's probability of future dangerousness, a critical punishment issue. Art. 37.071(b)(2), V.A.C.C.P. As expected, Dr. Grigson testified that in his opinion appellant was a sociopath and represented an extremely severe threat to society. Besides Dr. Grigson's testimony, the State also presented testimony at the punishment phase from a learned psychologist, Dr. Landrum, whose testimony largely mirrored that of Dr. Grigson's.[2] Landrum testified appellant had an extensive drug abuse problem and a sexual deviation which manifested itself in violence and aggression against humans. Landrum also opined appellant would constitute a continuing threat to society, had a high probability of acting out in an aggressive and harmful manner, and was incapable of rehabilitation.[3] In its jury argument at punishment, the State

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[2] On direct appeal, this Court determined Dr. Landrum's testimony was properly admitted. *Cook v. State*, 741 S.W.2d 928, 945 (Tex.Crim.App. 1987).

[3] See the facts as set out in *Cook*, 741 S.W.2d at 945.

referred to the testimony from both the doctors, calling Dr. Grigson by name twice and clearly referring to Dr. Landrum as "a professional psychologist with ten years experience" and distinguishing his testimony from Dr. Grigson's by referring to him as "that young psychologist." The majority opinion attaches great significance to these references, but it is equally plausible the State made this distinction between the two for the sake of keeping its summation of the evidence easier to understand and follow. See slip op. at p. 7.

Other evidence was also admitted at the punishment phase of the trial. The State presented testimony from no less than thirteen witnesses who testified to appellant's bad reputation for being a peaceable and law-abiding citizen. This testimony came not only form law enforcement personnel but also from personal acquaintances who had known appellant for years. The State also introduced appellant's previous conviction for felony theft.

The evidence at punishment, however, is not all that a reviewing court considers in its harmless error analysis. *Harris*, 790 S.W.2d at 586. The Court must review the entire record, and in this cause, the record from guilt/innocence is particularly illuminating of appellant's propensity for violence. The facts of this offense are more than adequately summarized in this Court's opinion on direct appeal. *Cook*, 741 S.W.2d 928. This offense was committed in an extremely brutal and vicious manner. The mere facts of the offense present appellant as an abhorrent character. The jury must have wondered why this innocent victim should die such a horrifying death at

the hands of a stranger. Although all murders are senseless and cruel, appellant's crime was particularly reprehensible as he cut away pieces of the victim's body, which pieces were never found. The jury did not need any specialized knowledge from an expert witness to determine appellant would be a continuing threat to society. The facts of this case alone could convince someone of that. Nevertheless, the testimony from both doctors was available for the jury's consideration in answering the special issues. Given the *entire* record in this cause, i.e. the facts of the offense, the cumulative nature of Dr. Landrum's testimony, and the remaining punishment evidence, I conclude the impact of the error in admitting Dr. Grigson's testimony was nil. Any impact at all was dissipated by the other evidence in this case. In other words, I conclude a rational trier of fact would not have reached a different result in this cause had the error not resulted. *Harris*, 790 S.W.2d at 588. The conviction in this cause should be affirmed.

In reaching this conclusion, I echo Judge Campbell's concerns in his concurring opinion that the Supreme Court's harmless error analysis in *Satterwhite*, supra, has left "inconsistency and uncertainty . . . in its wake" which leads to confusion among appellate judges. See *Cook v. State*, ___ S.W.2d ___ (Tex.Crim.App. No. 63,643 delivered September 18, 1991) (Opinion on Rehearing after Remand from the United States Supreme Court) (Campbell, J., concurring), slip op. at p. 4. This Court, with its harmless error analysis in this cause, has surely only contributed to the inconsistency. The majority opinion fails to utilize this Court's harmless error analysis from *Harris*, and as a result, also reaches the wrong conclusion in this cause.

Accordingly, I dissent to the denial of the State's motion for rehearing in this case.

Miller, J.

Delivered: October 30, 1991

Publish

McCormick, PJ., and White, J., join this opinion.